LIBRARY
SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 490

JOHN L. BRADY, PETITIONER

vs.

MARYLAND

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF MARYLAND

PETITION FOR CERTIORARI FILED APRIL 7, 1963
CERTIORARI GRANTED OCTOBER 8, 1963

Supreme Court of the United States

OCTOBER TERM, 1962

No. 490

JOHN L. BRADY, PETITIONER

vs.

MARYLAND

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

INDEX

	Original	Print
Proceedings in the Court of Appeals of the State of Maryland		
Appellant's appendix consisting of proceedings in the Circuit Court of Anne Arundel County, Maryland	A	1
Opinion and order, Duckett, J.	3	2
Excerpts from testimony	17	16
Testimony of Louis M. Strauss—direct	17	16
—cross	18	17
Morris Turk—direct	19	17
—cross	20	19
Bernard Kiessling—direct	21	20
George B. Woelfel—direct	25	23
—cross	30	27
Maxwell Frye—direct	32	29

	Original	Print
Appellant's appendix consisting of proceedings in the Circuit Court of Anne Arundel County, Maryland—Continued		
Excerpts from testimony—Continued		
Testimony of George W. Wellham—direct	36	33
John Leo Brady—direct	37	34
G. Osborne Duvall—direct	37	34
—cross	40	37
—redirect	41	37
Extrajudicial statement of Charles D. Boblit	42	39
Court's instructions to jury at trial of case	45a	42
Opinion, Brune, C.J.	46	46
Mandate	56	53
Clerk's certificate (omitted in printing)	57	54
Order ~~extending~~ extending time to file petition for writ of certiorari	58	55
Order allowing certiorari	59	56

[fol. A]

IN THE COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 1961

No. 135

JOHN L. BRADY, APPELLANT

v.

STATE OF MARYLAND, APPELLEE

APPEAL FROM THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY (O. BOWIE DUCKETT, Judge)

APPELLANT'S APPENDIX

(Filed August 23, 1961)

* * * *

[fol. 2] * * *

[fol. 3]

APPENDIX TO APPELLANT'S BRIEF NO. 135

IN THE CIRCUIT COURT
OF ANNE ARUNDEL COUNTY, MARYLAND

OPINION AND ORDER—April 7, 1961

In the early morning of June 28, 1958, John L. Brady and Charles D. Boblit robbed and brutally murdered William Brooks in Anne Arundel County.

Brady was tried first before Judges Michaelson and Evans and a jury. The jury found Brady guilty of murder in the first degree.

Boblit was subsequently tried by Judge Michaelson without a jury. He was also found guilty of murder in the first degree. Both Defendants received the death sentence. The two Defendants then appealed their convictions to the Court of Appeals of Maryland. The Appellate Court on September 24, 1959 affirmed the judgments of the Circuit Court (220 Md. 454).

On November 12, 1959, Brady filed a motion for a new trial in the Circuit Court which was denied on November 23rd by Judges Michaelson and Evans. On November 24, Brady filed a motion for reduction of sentence. Same was denied on December 8th and the matter again appealed to the Court of Appeals. On May 19, 1960, the Maryland Appellate Court dismissed the appeal but without prejudice to Brady to seek relief under the Post Conviction Act (222 Md. 442).

Brady's case is now before this Court on a Petition filed by his Attorneys on September 14, 1960 under the aforesaid Act, wherein a new trial is requested. It is the Petitioner's contention that his constitutional rights were violated because the State's Attorney neglected to advise Brady's Attorney of an unsigned statement of Boblit in which Boblit stated that he actually choked Brooks, although it was Brady's idea and that the crime was committed at Bradys' suggestion.

Both Defendants were represented by competent and experienced Attorneys in the Circuit Court and the Court [fol. 4] of Appeals. It is conceded that Brady is guilty of murder in the first degree, as the murder was committed in the perpetration of a robbery. However, Petitioner contends that if Boblit's unsigned statement had been available the jury which tried Brady may have added to its verdict the words "without capital punishment", and, therefore, that Brady was deprived of his constitutional right to due process.

Briefly, the pertinent parts of the Post Conviction Statute provide:

> "(a) Any person convicted of a crime and incarcerated under sentence of death or imprisonment, * * * who claims that the sentence or judgment was imposed in violation of the Constitution of the United States or the Constitution or laws of this State, * * * or that the sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under a writ of habeas corpus * * * may institute a proceeding * * * to set aside or correct the sentence, providing the alleged error has not been previously and finally litigated or waived in the proceedings resulting in the conviction * * * *".

While this Petition under the above Act for a new trial is filed only on behalf of Brady, I find it necessary to review the voluminous transcript in both cases because of the contention advanced by the Petitioner. It is readily apparent from the numerous conflicts, contradictions, changes and repudiations in the testimony and the several statements given by these Defendants, that neither had any conscientious scruples against committing perjury, and that each would give any statement or testimony which he considered beneficial to himself at the time.

It is also apparent from the evidence that Brady planned the crime (p. 114) and was the leader during the entire time. Brady had known Mr. ~~Broke~~ Brooks for fifteen years. Brady was familiar with the country where

[fol. 5] Brooks lived and where the body was hidden. Brady owned and drove the automobile which transported them to the Brooks farm. Brady hid the automobile. Brady obtained the shot gun. Brady purchased the pistol. Brady had the adhesive tape. It was Brady's idea to steal a fast car, namely, Brooks' (p. 117) for use in a contemplated bank robbery. Brady destroyed the evidence (p. 126).

As to Boblit, he had never seen Brooks before. He did not know the country. He had no car, no gun and no pistol until supplied by Brady. Being an unscrupulous moronic character, he was just willing to go along.

Brady's testimony at his trial was incredible. He first attempted to put all blame on Boblit by testifying that Boblit had choked Mr. Brooks while his (Brady's) back was turned (p. 108); later, that he would have done anything in the world to absolve Boblit (p. 112, p. 122).

As previously stated, a number of inconsistent statements were made by each Defendant. Briefly, the pertinent portions of these statements are as follows:

BRADY'S STATEMENT—MIAMI, FLORIDA—JULY 1, 1958

> "* * * About midnight we parked my car in the vicinity of William Brook's house * * * I told Donald Boblit to stay in the car and then I walked to about two hundred yards from Brook's house where I dragged a log across the road. After some time Brooks drove up in his * * * Ford. * * * When Brooks got out of car to remove the log from the road I hit him in the head from the rear with a piece of pipe about sixteen inches long and ½ inch in diameter. I knocked Brooks out and then I loaded him into the back seat and drove him to a spot near the Patuxent River south of Odenton, Md. I dumped Brooks out of the Car * * * I left him in the brush about fifty feet from the road. Then I drove back to my own car where Don Boblit was waiting. Boblit asked me where I got the car and I told him that I had borrowed it. * * * "

[fol. 6]

BRADY'S STATEMENT—MIAMI, FLORIDA—JULY 3, 1958

"* * * On the evening of June 27, 1958, Donald and I were again in my car in Odenton. I told him that we should steal a car to use in the bank robbery. I remembered that William Brooks, a man whom I have known for about 10 years, had recently got himself a new Ford automobile. I thought it would be fast and would be a good car to use in the robbery. I knew that he was working a night shift at National Plastics Company and would be arriving home in his car shortly after midnight. * * * I decided we had better leave Brooks in some isolated spot since we didn't know how bad he was hurt. * * *

"* * * As we were leading Brooks along into the woods Donald suddenly wrapped the red plaid shirt around Brooks' neck and threw him to the ground and began strangling him. Brooks was on his back and Donald was kneeling down beside his head twisting the sleeve of the shirt around Brooks' neck. I heard Brooks gasping and choking and knew that Donald was strangling him to death. I said nothing to Donald and did not try to stop him. I believe that Donald choked Brooks for about three minutes. We then felt his heart and found that it was not beating. We carried him on back into the brush another 25 to 30 feet, laid him on the ground and covered him over with brush in an effort to hide him. * * *

"* * * on the ride from where we had left Brooks to pick up my car, I removed the money from Brooks' billfold and threw the billfold in the Patuxent River.

"* * * I divided the money evenly between us and believe there was approximately $250.00. * * * I had decided that I would try to keep Donald out of trouble and, if caught, to take the full blame and say that he was not involved in any way. * * *

"On Sunday morning, June 29, 1958, I took Donald's red plaid shirt, the one with which he strangled Brooks, and because of the blood on it, burned it."

[fol. 7]

BRADY'S STATEMENT—JULY 9, 1958—FERNDALE POLICE STATION, MARYLAND

"* * * Donald suggested getting out in front of him when he pulled in the drive way in order to stop him. I told him no, we'll put a log across the road * * * So when he got out of the car, Donald was supposed to take him back behind the car because he would see me and I knew him. * * * I heard Donald hit him. * * * Donald and I put him in back of the car, on the floor. * * * On the way down their we decided we would have to kill him because he seen Donald. Going down to the river I told Donald to take the bill fold out of his pocket, and he did and layed it on the seat in front. * * * before we took him out of the car, Donald wanted to shot him, and I said no, for him to take and use his shirt. So then we took him out of the car and walked him about a 100 feet I guess, that's when we stopped, Donald put his shirt around his neck and threw him on the ground and choked him to death. * * *

Q. For what reason did you see Mr. Brooks that morning? A. I borrowed $2.00 from him.

Q. Was that * * * June 27, 1958? A. Yes, sir. * * *

Q. Why did you go to him to borrow $2.00? A. Because I knew of no one else I could borrow from. * * *

Q. When was the shirt taken out of the car to be used to strangle Mr. Brooks? A. When we took him out.

Q. Then you decided before he was taken out, to strangle him, is that correct? A. Yes. * * *

Q. What did you do while Donald choked Mr. Brooks to death? A. I just stood their.

Q. Did you at any time try to stop Donald from killing Mr. Brooks? A. No.

[fol. 8]

BOBLIT'S STATEMENT NO. 1 (PERTINENT PARTS)—
JULY 2, 1958

"I Charles Donald Boblit make this statement that on the 27 day to help Jhon B. to rob one WMB and take his body to the river brige and I sow Jhon B kill hin.

"I did not no that he was gorin to kill hin. Jhon B say that he was gorin to let hin stay a alive just knok WWB out and leve hin.

"this was about 12.30 or 1 Sat."

CHARLES DONALD BOBLIT

BOBLIT'S STATEMENT NO. 2 (PERTINENT PARTS)—
JULY 2, 1958

"* * * Q. Will you now, in your own words tell us of the events that led up to Williams Brooks being robbed and killed? A. Well, it was Friday the 27th, Brady told me he knew where we could get some money, he said that he knew this man William Brooks carried large sums of money and he knew where we could get a fast car. Brady told me how we could hold him up, by putting a log across the road, so when he saw the log he would have to stop. We rode up to the road that led to the man's house and we waited on the side of the road for him to come. We had put the log across the road and about five minutes later he came. He sat in the car for about two minutes, then he got out, bent down and picked the log up and put it off the side of the road. He started to get back in the car and then Brady hollered and told him to move away from the car or he would blow his brains out. The man walked to the back of the car, Brady told him to turn around and Brady took the barrel of the gun and hit him in the head with it. Brady and myself put him on the floor of the back seat of hi car.

Then we went down to where Brady took my shirt, twisted the sleeve and choked him. Then we took him into the woods, Brady broke branches and put [Vol. 9] them across his face. We come back and the lunch box was sitting right about where Brady choked him and then Brady threw the lunch box into the woods. * * *"

BOBLIT'S STATEMENT NO. 3—JULY 3, 1958

In this statement, Boblit merely confirms his two previous statements.

BOBLIT'S STATEMENT NO. 4 (PERTINENT PARTS)—JULY 5, 1958

"* * * Q. When was it decided by either you or Brady that Mr. Brooks would be killed? A. After Brady had hit him.

Q. Why did you and Brady decide to kill him? A. Because Brady knew him, and he thought he might have recognized Brady and myself.

Q. Did you and Brady discuss killing Mr. Brooks before he was killed? A. Yes sir.

Q. Where did this discussion take place? A. On the way down to where we found Mr. Brooks, Brady was going to shot him, that's what I thought he was going to do. He must have changed his mind on the way down, I guess he was afraid somebody would hear the shot.

Q. What was the conversation between you and Brady in regards to killing Mr. Brooks? A. Well, when we were up their on the road when Brady told Mr. Brooks to back away from the car, that's when Mr. Brooks turned around, that's when he must have got a look at Brady. Then Brady told him to turn around or he would blow his brains out with the shot gun. That's when Brady hit him with the gun. Mr. Brooks took and fell to the ground and he hollered two or three times; Oh you killed me. Then is when we put him in the car. Then we started up the road, then Brady said he would have to shot

him, I didn't say nothing I was to scared. Almost
[fol. 10] down their is when he must have changed his mind, cause he had my pink shirt in his hand when we walked him over to the edge of the woods.

Q. Then when you got to the woods, you had no intention of stopping Brady from killing Mr. Brooks is that correct? A. Well, I was thinking about it.

Q. But it was agreeable with both of you that Mr. Brooks had to be killed, is that correct? A. Yes sir."

BOBLIT'S STATEMENT NO. 5 (PERTINENT PARTS)—UNSIGNED—JULY 9, 1958

"* * * Q. Charles, since you gave your last statement to us, certain evidence has been uncovered that indicates that you might possibly have a few discrepancies in your previous statements. At this time we would like to ask you a few more questions to clear these up, is that satisfactory with you? A. Yes.

Q. In previous statements you have indicated that John Leo Brady struck Williams Brooks in the head with the shot gun, is that correct? A. Yes.

Q. We would like to ask you at this time if John Leo Brady struck Mr. Brooks with the shot gun or did you? A. I did.

Q. Did you strike Mr. Brooks with the shot gun on the drive way to his home which is located at Hidden Village, Quarterfield Rd., Severn, Md. A. I don't know if it is hidden village or not but it was near Quarterfield Rd.

Q. Where was John Leo Brady when you struck Mr. Brooks? A. Standing off on the side of the road.

Q. This took place on June 27, 1958 is that correct? A. That is correct.

Q. Do you know what time this took place? A. It was about 12:30 or 12:45 that night.

[fol. 11] Q. If it happened at 12:30 or 12:45 A.M. it would have been June 28, 1958, is that correct? A. That's correct.

Q. Also, after you and John Leo Brady took Mr. Brooks in his car to where his body was later found, you indicated in your previous statements that John Leo Brady strangled Mr. Brooks with your shirt, is that correct? A. That's what I told you, yes.

Q. Do you wish to change this part of your statement? A. Yes.

Q. What did occur at the scene of the strangulation? A. Well he had the gun until then, no I had the gun. I had the gun and the shirt. Then he took the gun from me, that was after I said I would have to shot him. Brady said no, lets strangle him. That's when I took and twisted my shirt sleeve and choked him. Then we carried him back into the woods.

Q. Why did you tell Brady that you would have to shot Mr. Brooks? A. Well that was right after Brady and I decided he would have to be killed.

Q. Did you know Mr. Brooks? A. No sir, I never saw him before in my life.

Q. Were you wearing the shirt, and take it off to strangle Mr. Brooks? A. No.

Q. Where was the shirt? A. Well when we were going down in the car the shirt was over the pistol.

Q. Where was the pistol? A. I had it in my hand.

Q. Did you choke Mr. Brooks while he was standing or did you knock him down and then choke him? A. I put the shirt around his neck while he was standing.

Q. Did you choke him until he fell or did you knock him down before you started choking him? A. I started choking him, he fell by himself.

Q. Charles, why didn't you tell us these things before? A. I don't know.

[fol. 12] Q. Charles, since you struck Mr. Brooks in the head and also strangled him, could it be possible that you planned to rob Mr. Brooks and not Brady? A. No sir, I didn't even know the man. It was his idea to hold him up and not mine and it was his idea to strangle him, I wanted to shot him.

Q. Is there anything else that is incorrect in your previous statements that you would like to correct at this time? A. Not as I know of.

Q. Is there anything else you would like to add to this statement? A. No.

Q. Is this statement true and correct to the best of your knowledge? A. It is.

Q. Will you sign this statement? A. Not before I see a lawyer.

Q. This entire statement of two pages will now be read to you, if it is correct will you answer by saying yes then if you car to, you may sign this statement is that understood? A. Yes.

Q. Is this statement the same as you answered us, or is their any errors that have been found while it was read to you? A. That's the way I gave it.

Q. Would you care to sign this statement? A. No."

The pertinent parts of Boblit's testimony at his trial on March 9, 1959 are as follows (p. 107):

"* * * Q. What happened then? A. Well we got out of the car and went around, opened the back door on the driver's side, opposite the driver's side, I did, and Brady got out and he opened the other side, on the driver's side, the back door. We took the man out. We took him out opposite the driver's side. I closed the doors. Brady had started to walk the man over towards the woods. He had gotten my pink shirt out, before I got around to the other side of the car. I was steadying the man, put my arm [fol. 13] underneath of him and he was walking by himself. We just put his arms around our neck. We alked him over there and we stopped at the edge the woods. It was a clearing there. We stopped there and then Brady, he handed me the pistol and I handed it back to him. He put it in his belt and he started twisting the sleeve up. I thought he was going to rip the shirt up, but he didn't. He put it around the man's neck and choked him.

Q. Where were you at this time? A. I was standing about from here to where the box is.

Q. Where those chairs are? A. To that box.

Q. While this happened did you do anything? A. I was too scared.

Q. Did you try to stop him? A. No, sir. I am no hero. I thought if he killed that man he would kill me too.

Q. (Court) What was that last you said? A. I said I wasn't no hero. If he killed that man he would kill me too.

Q. Well what made you think that Brady would kill you? A. I thought if he changed the plans on me like he did, and he killed that man what was to stop him from killing me. I was the only witness against him. * * *

(p. 109) Q. You saw Brady take your shirt and put it around the man's neck, is that correct? A. That's correct.

Q. And he twisted it? A. That is correct. * * * *"

(p. 132) Q. But you did discuss the necessity of killing him, didn't you? A. Yes, sir. It did come up.

Q. And wasn't there a conversation between you and Brady as to whether to shoot him or strangle him? A. I think there was,

Q. You know there was, don't you? A. There was.

[fol. 14] Q. And you wanted to shoot him, didn't you? A. Yeh, but Brady said strangle him.

Q. Brady said strangle him so you strangled him, right? A. I did not strangle him."

LAW

In determining whether there was a denial of due process in this case, several established principles of constitutional law are pertinent. Due process of law under the Fourteenth Amendment to the Federal Constitution is equivalent to "the law of the land" as used in the Maryland Declaration Of Rights, providing that no man ought to be deprived of his life, liberty or property but by the law of the land. 5 M.L.E., § 261.

An asserted denial of due process should be tested by an appraisal of the totality of facts in a given case. 5 M.L.E., § 262.

So we find the Supreme Court saying:

> "That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may in other circumstances and in the light of other considerations, fall short of such denial." *Betts* v. *Brady*, 316 U.S. 455, 86 L. Ed. 1595.

Due process of law in a criminal case requires, in addition to (1) a legal offense, (2) a competent court, (3) an accusation in due form, (4) a notice and an opportunity to defend, a *fair* and *impartial* trial in conformity with the criminal procedure of the State where the case is tried. While the Fourteenth Amendment, providing that no state shall deprive any person of life, liberty or property without due process of law, requires that state action be consistent with fundamental principles of liberty and justice, it does not deprive the state courts of their control of *procedure* in criminal trials. 5 M.L.E., § 283.

[fol. 15] The question, therefore, is not whether the State's action in withholding Boblit's unsigned statement is improper but whether said action considered together with all the other facts and circumstances was so prejudicial as to constitute a denial of due process. *Application of Tune*, 230 F. 2d 883, Cert. denied 351 U.S. 987, 100 L. Ed. 1500.

It should also be understood that the law does not require in every criminal case that the prosecution reveal the availability of testimony inconsistent with the state's contentions. However, under special circumstances, such non-disclosures may amount to fundamental unfairness resulting in a denial of due process. *U.S.* v. *Dye*, 221 F. 2d 763, cert. denied 350 U.S. 875, 100 L. Ed. 773.

In light of the above, let us consider the facts and circumstances in the case at bar. Many of the circumstances were adduced in Petitioner's recent hearing before this Court under the Post Conviction Procedure Act. At

this hearing, the State's Attorney and the several attorneys who represented the Defendants testified in addition to the police officers and the Petitioner Brady. While there was a slight conflict in the testimony of Petitioner's Attorney, Mr. Woelfel, and Mr. Duvall, the State's Attorney, it may be assumed that the State's Attorney refused to disclose Boblit's unsigned statement to Mr. Woelfel and that same did not come to his attention until after the trial.

Under all the circumstances, this does not amount to a denial of due process for several reasons, viz:

1. It is a matter of procedure as to whether the State's Attorney is required to furnish Petitioner's Attorney, upon his informal request, a confession of a third party.

2. Boblit's statement, whether signed or unsigned, would not have been admissible in Brady's trial.[1]

[fol. 16] 3. The State's Attorney's failure to disclose this statement was immaterial as its non-disclosure was not fundamental in obtaining a fair trial or prejudicial to Petitioner.[2]

4. When all of the facts and circumstances concerning Brady are considered, as the law requires in this proceeding, it is apparent that the jury's verdict was not only proper and correct, but the only reasonable or responsible verdict under the circumstances.[3]

---

[1] *Donnelly* v. *U. S.*, 228 U.S. 243, 57 L. Ed. 820; *Munshower* v. *State*, 55 Md. 11, 71 A. 1063; *Brennan* v. *State*, 151 Md. 269, 134 A. 148.

[2] In considering this point, it must be realized that Boblit's statement did not absolve Brady but merely stated that Boblit was the one who actually twisted the shirt sleeve and choked the victim, although it was Brady's idea to strangle Brooks and they both carried him back into the woods. It should also be remembered that Boblit had previously made four other statements (signed) in which he said that Brady was the one who strangled Brooks; and moreover, at his trial, Boblit testified that Brady strangled Brooks and that his unsigned statement of July 9th was not true, (pgs. 108 and 109), *Application of Tune*, *supra*.

[3] From a perusal of the testimony and statements in the case, it would appear that Brooks would not have been killed except for Brady. Brady planned the robbery. He supplied the weapons. He was the leader and controlled Boblit's actions. Brady, although de-

5. More than a remote possibility or speculation is necessary to show a denial of due process.[4]

[fol. 17] For the above reasons, the Court concludes that the Petitioner is not entitled to relief under the Post Conviction Procedure Act, and the Petition is hereby dismissed.

O. BOWIE DUCKETT,
Judge.

April 7, 1961

---

nying that he had actually strangled Brooks, admitted it was done at his suggestion and in his presence. The latter is also set forth in Boblit's unsigned statement.

[4] It must be conceded that Boblit's unsigned statement was inadmissible at Brady's trial. Petitioner, however, contends that regardless of this, he was entitled to the statement before his trial on two grounds: (1) That he might have postponed his trial until after Boblit was tried and then called Boblit as a witness; (2) Another speculation advanced was that he could have called as witnesses the three police officers who took the statement.

As to the first point, testimony at his trial proved this to be most disastrous, as Boblit testified that Brady strangled Brooks and that his unsigned statement of July 9th "is not true". Furthermore, it is not a right of the Defendant to arrange the trial assignment but that of the State's Attorney and the Court's.

As to the second point, there is no showing that a careful investigation of the facts before trial or an interview with the police officers would not have disclosed the desired information.

IN THE CIRCUIT COURT OF ANNE ARUNDEL COUNTY

TESTIMONY

LOUIS M. STRAUSS, a witness of lawful age, having been duly sworn, deposes and says:

DIRECT EXAMINATION

By Mr. Bamberger:

* * * *

2. Mr. Strauss, did you represent Charles Donald Boblit in a trial for murder in 1959? A. I did in association with Morris Turk, another member of the Anne Arundel County Bar.

* * * *

6. Now, in the course of preparation for that trial, did there come a time when you obtained from the prosecutor statements—extra judicial statements which had been made by your client to the police? A. Yes, I believe my associate, Mr. Turk, obtained those and we went over those together.

7. Do you know whether they were obtained from Mr. Duvall or from someone else? A. I have no independent knowledge but my assumption was that it came from the State's Attorney's office.

8. Did you ever tell Mr. Woelfel, at anytime prior to the trial, and conviction of John Brady, that your client, Boblit, had made a statement in which he, Boblit, admitted that he had hit Mr. Brooks on the head and had subsequently strangled him? A. No, I don't recall making such a statement.

[fol. 18] 9. Well, do you recall that you did not affirmatively recall that you did not give that information to Mr. Woelfel? A. To the best of my knowledge, I did not. I don't think I discussed Mr. Brady's defense with Mr. Woelfel at all except possibly the pre-trial conference in Judge Michaelson's office when the only issue involved was who was going to take the jury trial, whether they both would or whether one would take a court trial. I believe

Mr. Woelfel indicated he wanted a jury trial and Mr. Turk and I agreed that we wanted a court trial and the court trial would follow the jury trial of Mr. Brady.

* * * *

CROSS EXAMINATION

By Mr. Duvall:

* * * *

3. Now, who was at attendance at this pre-trial conference in Judge Michaelson's chambers, do you recall? A. I believe, to be perfectly frank I just had my memory refreshed last week, as I recall it the State's Attorney, Judge Michaelson, Mr. Woelfel, Mr. Turk and myself.

4. And do you recall in the course of the conversation with Judge Michaelson that Mr. Woelfel indicated he was electing a court—a jury trial because Brady claimed that he did not strangle the decedent and therefore it was the strategy that if he could persuade the jury to bring in a verdict of first degree murder without capital punishment Boblit would probably get the benefit of that in the court trial which you and Mr. Turk had chosen? A. I have no independent recollection of that. That apparently was running through my mind as far as Boblit was concerned.

* * * *

[fol. 19] MORRIS TURK, a witness of lawful age, having been duly sworn, deposes and says:

DIRECT EXAMINATION

By Mr. Bamberger:

* * * *

2. Did you represent Charles Donald Boblit in a trial for murder in 1959? A. Yes, I did in association with Louis M. Strauss, another member of the bar.

* * * *

5. Did there come a time when you obtained from the prosecutor, Mr. Duvall, or his office copies of extra judicial statements which had been made by your client? A. Yes.

6. Do you remember when you got those? A. No, I don't. I know it was before the Boblit trial.

7. Do you know if it was before the Brady trial which was in the early part of December, 1958? A. I don't recollect. If my memory serves me right, they were obtained before the Brady trial. I'm not definitely sure.

8. Do you remember how many statements there were? A. Four, if I remember.

9. Well, do you remember if they included a statement dated July 9, 1958 which is two pages long and I show you a copy of it and further identify it. It's a statement which Mr. Duvall offered at Boblit's trial but which the Court did not admit in evidence. Do you recall whether you had that statement which was dated July 9, 1958 prior to the Boblit trial? A. I remember that there was a statement which the State's attorney attempted to introduce which was not signed by Charles Donald Boblit and we objected and the Court sustained the objection and the statement was never entered into evidence at the Boblit trial.

10. Well, now do you remember if you had that particular statement prior to the trial? A. Yes.

[fol. 20] 11. And it was one of the ones that you got from the prosecutor? A. Yes.

12. Who did you obtain those from? A. My recollection is from the State's Attorney, Mr. Duvall.

13. Mr. Duvall. And you got all of the statements that you got did you get from him on one occasion? A. Yes.

14. And this occasion, to the best of your recollection now, was prior to the Brady trial in early December? A. Yes.

15. Now, did you prior to the trial of Brady and his conviction ever tell Mr. Woelfel of the existence of that statement of July 9, 1958? A. No, I did not.

16. Did you ever tell him of the substance of it? A. No, I did not.

17. Did you ever tell Brady of the substance of it? A. No, I did not.

18. Did you participate in this pre-trial conference in Judge Michaelson's chambers? A. Yes, I did.

19. And who else was present? A. To my best recollection was Mr. Duvall, Mr. Woelfel, Mr. Strauss, myself and Judge Michaelson.

(Mr. Bamberger) No further questions.

CROSS EXAMINATION

By Mr. Duvall:

1. Do you recall whether or not Mr. Woelfel at anytime prior to Brady's trial asked you what your client, Boblit, had told the State? A. No, he did not.

2. Now directing your attention to the pre-trial conference about which Mr. Bamberger asked you, do you recall a conversation during that conference in which counsel for Brady, namely Mr. Woelfel, indicated that his strategy would be to try Brady before a jury on the basis of Brady's denial that he had strangled the victim with the hope that he could persuade the jury to bring in a [fol. 21] verdict of murder in the first degree without capital punishment and the possible result of that verdict would be that Boblit would be treated in a similar fashion in his trial before the Court. The jury having tied the Court's hand's in Brady's case? A. I don't recollect the exact conversation as to verbiage. I know that that at least was our plan for Boblit to let Brady go first with the jury trial. And that whatever possible benefit Mr. Woelfel had with Brady before the jury we felt that would be to Boblit's benefit in our court trial. That I do remember.

* * * * *

8. Do you recall whether or not one of the purposes that you attended Brady's trial was to be present in the event that Mr. Woelfel called your client, Boblit, as a witness, to testify on behalf of Brady? A. No. The purpose of my attendance was to get the facts as was given under testimony at Brady's trial and then see what benefits we could derive for the defense of our client, Boblit.

9. Had there been any discussion between you and Mr. Woelfel about using Boblit to testify in Brady's trial? A. None that I recall.

BERNARD KIESSLING, a witness of lawful age, having been duly sworn, deposes and says:

DIRECT EXAMINATION

By Mr. Bamberger:

• • • •

47. Now then officer, after July 5, isn't it true that on the 6th or the 7th you went to Florida with another officer and picked up John Brady and brought him back to Washington and went to Lynchburg, Virginia and then brought him back to Ferndale? A. That's correct, sir.

48. And as a result of some information that you obtained in the course of that trip, either from John Brady [fol.22] or otherwise, you thought it necessary to take a fifth statement from Boblit, didn't you? A. That's correct, sir.

49. And that statement was one which you took—which was taken in your presence on July 9, 1958, is that correct? A. Yes, sir.

50. And I show you a copy of it to refresh your recollection. A. I was present during this taking, yes, sir.

• • • •

63. Now, officer, you got some information—what was it that caused you to go back to Boblit on July 9 and take this fifth statement from him? A. Well, just prior to July 9th, we received certain information that prompted us to go back and talk to Boblit.

64. What was that information? A. Information we received was that Boblit actually was the one that struck Mr. Brooks over the head with the shotgun and he was actually the one that strangled Mr. Brooks at the final scene.

65. What was the source of that information? A. The source was the second defendant in this case.

66. You mean John Brady had told you that Boblit was the one who had hit Mr. Brooks on the head and strangled him, is that right? A. That's correct.

67. When had he told you this? A. I don't remember the date but he told us that at the time we brought him back from Miami.

• • • •

80. Well, would you tell me as much as you can remember of just what occurred when you went to talk with Boblit on July 9? A. About all that I can tell you that occurred was that he was taken to the office—detective bureau upstairs. Lt. Frye and I and Capt. Wellham was present and we advised him that we had heard certain discrepancies and asked him if he would be willing to give a statement or answer questions that we would type out in a statement form and which he did. And during the statement—at one time during the statement [fol. 23] he asked permission to go to the rest room and this was granted. He was accompanied to the rest room and brought back to finish the statement. At the completion of the statement he was asked if he would be willing to sign it and he refused to sign it stating that he would rather talk to an attorney first.

• • • •

87. Was Boblit told the source of the discrepancy? Was Boblit told that they had picked up Brady and Brady had accused Boblit? A. Boblit was not told that we had picked up Brady but Brady was in the cellblock at Ferndale and Boblit actually saw him there. We never advised Boblit that Brady had made any accusations whatsoever nor that he had made any statements to us in reference to his offense.

• • • •

90. Well then how is it that you did just get down to talking about the only two facts that had been contradicted? A. Well that was actually what we had in mind to clear up and as far as we knew we had nothing to discuss with him.

91. Did Boblit ever in any subsequent conversation with you, ever in your presence between the time the statement was taken and the time of the trial repudiate the confession in the statement of July 9th? A. I can't remember him doing that.

• • • •

114. Did you ever discuss with any of your fellow officers or anybody in the State's Attorney's office the relevance in Brady's trial—with the importance of

Brady's trial of this—Boblit's admission of July 9 that he had committed the crime?

(Mr. Duvall) Objection.

(Court) Sustained.

* * * * *

(Mr. Bamberger) Your Honor, may I be heard on that.

[fol. 24] (Court) Certainly you can be heard.

(Mr. Bamberger) Well, it seems to me, sir, that that's the important point that if the evidence, whatever it be, that if any officer had thought that that was important and had discussed it with his superior or with the prosecutor and had been told, well, it isn't important and that it's not they don't have any right to know it.

(Court) You mean Mr. Bamberger that it's the duty of the police department to go up to the defense attorney and tell him what his defense should be and give him any facts at all in the case.

(Mr. Bamberger) No, sir, but my first question was whether he had ever discussed it with any police officers or with anybody in the prosecutor's office and I say this because of the case on which I rely which was decided by the Third Circuit, that is just what happened. The policemen were discussing the existence of a—certain evidence. They were discussing with—one of them was discussing with his superior in the police department that the police had in their possession evidence which was helpful to the defendant in the trial and his superior said to him, "Well, alright you don't have to tell anybody about that".

(Court) Well, I always thought that the police certainly had no duty to advise or even contact the defense attorney. I think that—

(Mr. Bamberger) I agree sir.

(Court) I think that the whole line of trial is up to the State's Attorney.

(Mr. Bamberger) I agree but suppose that Sergeant Kiessling here said to one of his superiors, "Well, you know I think this statement of July 9th that Boblit made, that we ought to make sure that when Mr. Duvall is preparing Brady's case, Mr. Duvall knows that it is in Boblit's case because Mr. Duvall might want to decide

whether he has a duty to give it to Brady's attorney" and Sergeant Kiessling's superior might say, "well, you just [fol. 25] —you don't have to tell anybody that". Now, your Honor, this isn't saying—this is what happened in the Pennsylvania case.

* * * *

(Mr. Bamberger) Your Honor, just for the record I want to make it clear that my question is directed to asking Sergeant Kiessling whether he ever discussed with any fellow member of the police department or with any member of the prosecutor's staff the possible importance or relevance of Boblit's statement of July 9 in the trial of Brady.

(Mr. Duvall) I note an objection.

(Court) Sustain the objection.

By Mr. Bamberger:

117. Now officer, did you or anyone to your knowledge in the police department make up any summary of the evidence in these cases to give to the State's Attorney besides this initial letter that you talked about—original letter? A. Yes, sir, I know everything that we had in the case was given to the State's Attorney's office.

* * * *

GEORGE B. WOELFEL, a witness of lawful age, having been duly sworn, deposes and says:

DIRECT EXAMINATION

By Mr. Bamberger:

* * * *

2. And Mr. Woelfel you were counsel for John Brady when he was tried and convicted of this crime, is that correct, sir? A. I was.

3. And you are still counsel for him with me, is that correct, sir? A. That's correct.

4. When did you first know of the existence of this statement by Charles Donald Boblit to Capt. Wellham, [fol. 26] Sergeant Frye and Corp. Kiessling, that was the rank then, dated June 9, 1958, I show you a copy of it.

(Court) July 9?

By Mr. Bamberger:

5. July 9. That one was unsigned? A. Yes, sir, when you pointed out to me—

6. When was that in relation to the trial of Mr. Brady? A. I know it was several months afterwards, how many months I don't know.

7. When was it in relation to the affirmance of Mr. Brady's conviction by the Court of Appeals? A. It was after that.

8. Had you ever requested from the State's Attorney the copies of statements made by Boblit? A. Not in that phraseology. What I asked him for was—I asked him had he made any confessions.

9. You asked him who had made any confessions? A. Both of them.

10. You did? A. And he said "yes" and I said that I'd like to have them. And I sat in his office one day and he gave me—I imagine three or four on each side. It was about four pages each. And I read one day until my eyes got tired and heavy and had to come back and read another day and I finished reading the second day. But this one that was unsigned was not in it.

11. Well, did he give you all that were subsequently introduced at the trial of Brady? A. My recollection is that he did.

12. Do you remember how many—whether he gave you four or five which had been made by Boblit—Do you remember whether there were four of them or five? A. I wouldn't like to say. My recollection is about four—about four a piece they made but they were all signed.

* * * *

[fol. 27] (Court) What is the purpose of this Mr. Bamberger?

(Mr. Bamberger) Well, the purpose of this, Your Honor, is to show that in the four statements which were taken from Boblit from July 2 until July 5 he had told one story of the events which was inconsistent in some respect with other facts investigated by the police, other testimony at these trials and which was clearly inconsistent with the statements—number of statements that

Brady had given and then sometime between the fifth and the ninth the police became conscious of this inconsistency and took this statement of July 9.

(Court) Well, won't the State's Attorney stipulate that's a fact?

(Mr. Duvall) Yes, I'll stipulate that's a fact.

* * * *

By Mr. Bamberger:

13. Now, Mr. Woelfel, I refer to the statement of Donald Boblit dated July 9, 1958 offered and marked for identification as State's Exhibit No. 28 at his trial and I show you now the ribbon copy, the original of that statement, which was two pages long and not signed by Boblit but signed by Wellham, Frye, Kiessling, in whose presence it was apparently taken, and I ask you if when you asked Mr. Duvall for a--the statements made by the various defendants if he showed you that one? A. No, he did not.

(Court) Confessions—confessions, his testimony was he asked Mr. Duvall for the confessions.

(Mr. Bamberger) Yes, sir.

(Witness) No, sir I did not see that.

By Mr. Bamberger:

14. And you did ask him for the statement which had been made by Boblit as well as your client, Brady? A. I think the word I used was confessions. I think this would constitute a confession but that's a matter of opinion.

[fol. 28] (Mr. Duvall) That's a matter of opinion.

(Witness) Although, I didn't ask him for statements I asked him for confessions.

By Mr. Bamberger:

15. And he showed you four other statements or confessions which had been made by Boblit, is that correct sir? A. About four, I think made by Brady, three or four —about eight of them. It took me two days to read them all.

16. I just want to make sure the record is clear that he did show you the other statements that had been made by Boblit? A. That's correct.

17. Do you remember when this took place? When these were shown to you? A. It was before the trial, what date I couldn't positively recollect.

18. And where was it? A. In the State's Attorney's office.

19. Who was present? A. I think it was the State's Attorney and, I think, Mr. Johnson was there too. It was just the State's Attorney and myself and some lady, I don't know who she was.

20. Was your request for these confessions or statements addressed to Mr. Duvall or to someone else in his office? A. Oh, no, Mr. Duvall was there. The question was made to him and I recall he said take them out because they had so many and so thick I wanted to take them home and was—

21. And was that request— A. No, I read them right there—I read them there all I could read in one day and came back the following day and read the rest of them.

22. Did you ever make that request in writing? A. No, sir.

23. Now, do you remember participating in a conference prior to Brady's trial in Judge Michaelson's office? A. Yes, sir.

[fol. 29] 24. Who was present then, sir? A. It was Judge Michaelson, Mr. Strauss, Mr. Turk, Mr. Duvall, myself. I think that was all, I don't think the Assistant State's Attorney was there that day.

25. What was discussed at that conference? A. Quite a number of things. What day we wanted to go to trial and how we elected trial and I recall I stated that in view of the fact that they took a jury trial I wanted mine first. And that the case would be limited to penalty for murder in the first degree.

26. Well, why would it be limited to that penalty, sir? A. Because there was absolutely no justification or reason or rhythm or rhyme for killing a man and both of them were, at least, engaged in robbery or larceny, which is a felony, and understanding of law if both of them involved in a felony—

(Mr. Duvall) I object to Mr. Woelfel explaining on the law. We know he's skilled in that but I don't think it is proper.

(Court) Overruled.

(Witness) And both of them were in the act of committing a felony they were charged each with a greater offense and one of them committing murder, which ever one of them it was, would be—would automatically charge the other one with murder.

By Mr. Bamberger:

27. Was there any discussion then of the fact that your principal defense of Brady was going to be based on the issue that he was not the one who struck Brooks on the head or strangled him? A. Yes, that was the only defense he could make as far as I could see.

28. Well, was that discussed at this conference before Judge Michaelson? A. Well, it probably was—it had to be.

29. Now, did either Mr. Turk or Mr. Strauss ever tell you prior to Brady's trial of the existence of that statement by Boblit of July 9? A. No, Mr. Strauss nor Mr. [fol. 30] Turk, admittedly didn't show it to me, as a matter of fact, I had a conference with them one day—twice—and tried to get them to get Boblit to take the witness stand and admit that he did the killing and that I would try this Brady case before the Jury first and it would save him from the gas chamber. The Court trying a second case of Boblit would be very apt to give Boblit the same sentence and I would see it in a number of those cases tried that whatever happened in the first usually happened in the second.

(Mr. Bamberger) I have no further questions.

CROSS EXAMINATION

By Mr. Duvall:

1. And it was your strategy that Brady claimed that Boblit struck Brooks over the head and also manually strangled him with a shirt? A. That's right.

2. And you have that knowledge at the time you had a conference with Messrs. Strauss and Turk? A. Oh yes.

3. That was prior to the time that we had that conference in Judge Michaelson's chambers, isn't it? A. Oh yes, that was—

4. Alright, just answer my question, please. Now at that time your strategy was to try Brady before a jury on the evidence that he did not—but Boblit was the one who struck Brooks over the head and strangled him in the hopes that the jury would bring in first degree without capital punishment as far as Brady was concerned? A. That's correct.

5. And Boblit make a defense of that in Boblit's trial before the Court, is that correct? A. Absolutely, that's correct.

6. Alright, now going back to the time that you visited my office, are you positive that you asked to see Boblit's [fol. 31] statements? A. Oh, yes, I wanted to see his statements for this reason—

7. Alright, now just answer my question, please.

(Mr. Bamberger) Now, Your Honor, I think Mr. Woelfel ought to be entitled to give a complete answer.

(Mr. Duvall) He can give it.

(Court) He can explain his answers if he wants to.

(Witness) I was looking for exactly whether there was anything in there where Boblit had said he had done the killing or whether anything was in Brady's statement that said that he did the killing. Then I found so many discrepancies in Boblit's confession and Brady here had made some discrepancies too, however, he came back voluntarily to stand trial. And various phases of the case lead me to believe that this boy wasn't the one who did the killing.

By Mr. Duvall:

8. Do you remember me taking the position that as counsel for Brady you were not entitled to see Boblit's statement? A. No, I don't recall sir.

9. Are you positive I showed you Boblit's statements or as you say some of Boblit's statements? A. I'm very sure I saw them all except this one that's my recollection. Because what I had in mind was this, if I could have

found a confession of Boblit I intended to summon Boblit and put him on the stand and then if he denied that he had done the killing to use that to contradict him for what good it would have been, I don't know, but that was the purpose of going around that way.

10. You didn't call Boblit as a witness? A. I couldn't call him because Strauss and—

11. Of your conference with Strauss and Turk? A. That's right, they wouldn't agree to it.

12. They wouldn't agree to it? A. They wouldn't agree to let him say he did it and furthermore I had no [fol. 32] evidence that he did do it other than what Brady had made his confession, or bringing it face to face by hearing him say that Brady did it.

(Mr. Duvall) I have no further questions.

MAXWELL FRYE, a witness of lawful age having been duly sworn, deposes and says:

DIRECT EXAMINATION

By Mr. Bamberger:

* * * *

34. Then on July 9th you took a statement from Boblit, is that right? A. One was taken from Brady on July 9th, also.

35. Well, which one was taken first? A. The one from Brady.

36. What time was that taken? A. Interrogation started 10:30 A.M. and we completed at 1:40 P.M. He wrote until 2:39 P.M. and then signed it.

37. Excuse me sir, that was ten what? A.M.? A. 10:30 A.M.

38. And what time did he sign it? A. At 2:38 P.M.

39. Now, on that same day you took a statement from Boblit, didn't you? A. That's right.

40. What time did you start that? A. 2:45 P.M.

41. So that was immediately after you finished taking a statement from Brady? A. That's correct.

42. What was the purpose of taking this statement from Boblit? This fifth statement now you've already taken four from him, correct? A. That's correct.

43. What's the purpose of taking the fifth statement? A. There were differences in of—to who may have partici- [fol. 33] pated in various ways. We questioned him again and took the fifth statement.

44. And as you said Boblit's trial was to see who told the truth, isn't that right? A. I don't recall whether I said that or not.

45. Well, wasn't that the purpose? A. Could have been, yes sir.

46. Now, was there any source—did you have any reason to doubt what Boblit had told you in these four statements other than the statement that you had taken from Brady? A. Several statements were taken from him—

47. From whom, sir? A. From Boblit and on each occasion something more was learned. The fifth statement was taken and at that time, as I recall, he had admitted what he had actually done in the case.

48. How long have you been in the police department, sir? A. A little over ten years.

49. And how long have you been in the detective bureau? A. Since 1956. November.

50. How much experience have you had in taking statements from persons accused of crimes? A. Since I went into the detective bureau I had occasion to take quite a few.

51. Well, you say you took these four statements from Boblit and each time you learned a little more? A. Yes, sir.

52. Was that one of the reasons that you went back to take the fifth statement from him? A. It's a normal practice that after one defendant is questioned and we get a statement or obtain a statement either verbally or in writing, typewritten, then we question the other defendant or how many others it may be and any number of times you have to go back to the original one you questioned and obtain another statement if they're willing to give one. [fol. 34] But did you have any reason to believe that Boblit had not yet told you the whole truth in the four

statements? A. There were some doubt but as exactly why we took the fifth statement now at this time I couldn't say I don't have copies of it and I don't recall what's on them.

54. But after you took the fifth statement, that's on July 9, now that's the last time you interrogated Boblit, wasn't it? A. That's correct.

55. And you didn't go back to interrogate—did you interrogate Brady again after you took the July 9th statement from Boblit? A. No, sir.

56. So the July 9th statement was the last interrogation of either defendant, is that correct? A. That's correct.

57. Boblit refused to sign the July 9th statement, didn't he? A. That's correct.

58. Let's go back again to the beginning of that statement. Do you have a copy of that, sir? A. No, I haven't.

59. I show you a photostatic copy of it. Before you took that statement did you tell Boblit why you were—you thought it necessary to take the fifth statement from him? A. As I recall he was told that we would like to take another statement from him. At that time he knew that Brady had been returned to the State and was in custody and our exact reasons before we started I don't recall advising him that we thought there was some doubt in what he said, I don't recall.

60. Did you tell Boblit what Brady had said? A. No, sir, we—not that I can recall I don't think that was done at all.

61. Did you tell Boblit just where the discrepancies were—did you direct his attention to the fact that discrepancies with respect to who had done the acts of violence? A. This statement, if I'm permitted to read it I may recall something that occurred. This statement are things that we wanted to know to bring the case to a conclusion he was asked the questions that were important.

* * * *

[fol. 35] (Witness reads the statement.)

64. Now, officer it's obvious from that statement there are two things that are concerned about that are the discrepancies which of the two defendants had hit Mr.

Brooks on the head and strangled him. Do you recall whether before you began typing the questions that you asked Boblit that you told him that's what you wanted to question him about? A. I don't recall our telling him that that was what we wanted to question him about. He knew at the time that Brady was in custody in the same building. I don't recall whether he'd seen him or not.

65. And in the one question where it says evidence has been uncovered in the case, you might possibly have a few discrepancies? A. I think that was mentioned to him and before he said "here's to" he decided we knew what it was all about and exactly what was taken so he answered the questions we asked.

* * * *

By Mr. Bamberger:

72. Well sir, alright. Do you have any knowledge, officer, when that statement or any copy of it was first furnished to the office of the prosecutor? A. As I recall, Capt. Wellham and myself, possibly Sergeant Kiessling delivered the entire folder to Mr. Duvall. The date I can't recall exactly but it was a short time after July 9th or 10th.

73. Did that folder include the original or a copy of the July 9th statement? A. Copies, the originals are kept on file at headquarters.

* * * *

84. So that sometime between July 9 and 23rd you had given the statement of Boblit of July 9 to Mr. Duvall, is that correct? A. That's correct.

* * * *

[fol. 36] GEORGE W. WELLHAM, a witness of lawful age having been duly sworn, deposes and says:

DIRECT EXAMINATION

By Mr. Bamberger:

* * * *

30. Now, when did you first have any contact with the other defendant, John Brady? A. The first contact was on July 9th.

31. And where was that? A. At the Ferndale Police Station.

32. And who was present? A. Sgt. Frye and Corporal Kiessling.

33. And was that when a statement was taken from Brady? A. Yes, sir.

34. And then after that you were present with the statement was taken from Boblit on July 9th, weren't you? A. Yes, sir.

35. Why was it necessary—or why was the decision made to take another statement from Boblit when you already had four statements from him? A. Well at the time that was our first contact—my first contact with Brady on the ninth. Prior to that Boblit had made certain statements and in questioning Brady certain things had to be determined. Boblit was requestioned.

36. You mean as a result of questioning Brady there were certain discrepancies with the story that Boblit had told you? A. That's correct sir.

* * * *

42. Now, this was taken did you ever participate in a conference with the State's Attorney or his assistant with respect to the investigation of this case in preparation of trial? A. As I recall, this has been sometime ago, but as I recall as we do in all cases we send to the State's Attorney's office a copy of everything that we have at our station pertaining to the case. On a case of this type, we [fol. 37] were constantly in contact with and he was advised of all the situation as it was.

* * * *

JOHN LEO BRADY, a witness of lawful age, having been duly sworn, deposes and says:

DIRECT EXAMINATION

By Mr. Bamberger:

* * * *

2. Now John, when did you first know that Charles Donald Boblit had made a statement to the police dated July 9, 1958 that he was the one who struck Mr. Brooks on the head and later strangled him? A. That was when I was in the Maryland Penitentiary.

3. Was that before or after the trial? A. That was after the trial.

4. Was that before or after you were sentenced? A. That was after I was sentenced.

5. Was it before or after your conviction had been affirmed by the Court of Appeals? A. I couldn't say whether it was before or after, I'm not too sure of that.

6. Had anybody ever told you before that Charles Boblit had admitted that he struck Mr. Brooks and strangled him? A. No, sir.

C. OSBORNE DUVALL, a witness of lawful age, having been duly sworn, deposes and says:

DIRECT EXAMINATION

By Mr. Bamberger:

* * * *

2. Mr. Duvall are you the State's Attorney for Anne Arundel County? A. I am.

[fol. 38] 3. How long have you occupied that office? A. Since February 1, 1953.

4. Who was your assistant during the—from June 1958 until the conclusion of the trial of John Boblit? A. John Brady or Donald Boblit?

5. Donald Boblit. A. Clarence L. Johnson.

6. And I understand Mr. Johnson is now deceased? A. He is.

* * * *

9. Now, did you participate in any way in the investigation? A. No, not in the sense that I was in the field. I was kept advised by—usually by Captain Wellham or one of the other officers as to what the developments were as they occurred.

10. When were you first advised that Boblit had stated that he was the person who had struck Mr. Brooks on the head and strangled him? A. That was sometime after the statement of July 9 was taken from Boblit and before the file, which I receive, was delivered by the police to my office. I don't know the date.

11. Do you have any correspondence which would show when that file was delivered or transmitted by a letter? A. I don't know, I'll take a look. My recollection is—well, let me say this, it's customary on cases that get this voluminous by the police that they deliver it by hand rather than send it through the mail but I'll see what I've got. No, I do not have a letter of transmittal from the police department and I believe that it was handled Hand Delivery.

12. Well, did you have it prior to the arraignment of Brady? A. Yes.

13. And that, of course, was prior— A. Now, by arraignment, you mean Circuit Court arraignment?

14. Yes, sir, certainly. Was that prior to the Grand Jury proceeding? A. That was prior to the indictment by Grand Jury, yes, he wouldn't be arraigned up until he was indicted.

[fol. 39] 15. Well, then did you ever have the other four statements of Boblit, the prior four statements? A. Yes.

16. Do you then also have the statements of John Brady? A. Yes, sir.

17. Did you ever prior to the trial of John Brady inform him or his attorney of the existence of this statement by Donald Boblit dated July 9? A. No and may I explain my answer.

* * * *

16. As I understand your last answer, you did not before Brady's trial tell him or his counsel of the existence of this statement by Boblit of July 9th? A. That's correct.

17. Now, did you tell either of them of its existence before Brady was sentenced? A. No.

18. Or before his conviction was affirmed by the Court of Appeals? A. Nope.

19. Now, was there ever a conference between counsel for Brady and counsel for Boblit in which you participated prior to the trial of Brady? A. One conference in Judge Michaelsen's chambers.

20. What was the purpose of that conference? A. The purpose of that conference was to have the counsel for each defendant elect their mode of trial, schedule trial dates and that was the prime purpose of those two meetings. In course of that, if, I may say again, if I go further than you want me to stop and I'll—

21. Well, at that time Mr. Woelfel elected a trial by jury for Mr. Brady, is that correct? A. Right. On the assumption of a statement by Mr. Woelfel that Brady's contention was—his contention in his trial was Boblit and not he was the one who had struck the decedent with the shot gun and had strangled the decedent the—

22. Now, why did you get that idea that it was Mr. Woelfel's strategy in this discussion in Judge Michaelson's [fol. 40] chambers, was that a statment by Mr. Woelfel? A. I wouldn't testify that that was a statement by Mr. Woelfel, no.

23. Well, how you get the idea that it was Woelfel's strategy without him having said it? A. Well, I believe he did say it but I can't swear that he said it. I'm not prepared to swear that he said it.

24. At least at that time you had a perfectly clear impression that the defense that would be presented by Brady was that Boblit was the person who had hit Brooks on the head and strangled him, is that clear? A. That was Brady's contention—to be Brady's contention at his trial and was.

25. And that was the—you knew for certain that that was to be his contention at this conference before Judge Michaelson? A. That was certainly my impression.

26. When was that with respect to the trial? A. At least two weeks and possibly longer because I had to make arrangements to have F.B.I. agents up from Miami and I think I asked for a conference well in advance to the

trial so that the trial dates would be firmed out and we wouldn't have any postponements.

(Mr. Bamberger) You may cross examine yourself, Mr. Duvall.

CROSS EXAMINATION

By Mr. Duvall:

In view of Mr. Woelfel's testimony this morning, my recollection is that Mr. Woelfel came to my office and asked to see the statements of Brady and of Boblit. And that I showed him the statements of Brady, which I had in my possession, and declined to, and never did, show him any statements I had of Boblit. I took the position—I have a recollection of a discussion with Mr. Woelfel that I did not feel under the rules that existed then and exist now, that the proposed Discovery Rules—that the counsel for one defendant could as a matter of law obtain statements in possession of the State which emanated from a co-defendant, whom the attorney did [fol. 41] not represent. I am prepared to say that I did not show to Mr. Woelfel any of Boblit's statements.

(Court) You said—what is that last statement?

(Witness) I am prepared to say that I did not show Mr. Woelfel Boblit's statements. I recall that Mr. Woelfel, as he testified this morning, did come back a second time to look at Brady's statements and further examine the statements taken by Agents in Miami as well as the statement taken by Anne Arundel County Police. They were lengthy statements that Brady gave in each instance, and Mr. Woelfel was in my office one day. They were made available to him and he returned either the following day or two days later and asked to see them again and they were made available to him.

REDIRECT EXAMINATION

By Mr. Bamberger:

1. Your recollection is perfectly clear that you agreed with Mr. Woelfel that he did ask you for Boblit's statements? A. Yes.

2. Was that after the conference in Judge Michaelson's office? A. No, that was before.

3. Was it very long before? A. I don't know. It seems — I don't — depends on when Mr. Woelfel was retained to represent Brady. My recollection was that he came in the office and said I've been retained by Brady's family to represent him and I'd like to see what you've got on Brady's statements and Boblit's, F.B.I. reports and autopsy report.

4. Did he ever renew that request? A. No, sir.

5. That request was made orally? A. Yes, sir. And I think the record should show in fairness to Mr. Woelfel that it's been the practice in this County that defense attorneys come to the State's Attorneys office and ask orally for what information they want. They do not go [fol. 42] through the formality of filing a petition with the Court unless in one instance I know it was done by counsel who were not members of the Anne Arundel County Bar and I suppose didn't know our practice.

6. At the time you had Mr. Woelfel asking for these statements did you then have in your possession the statements that Boblit had given including the statement of July 9? A. Yes.

7. Did you know what was the substance of the statement of July 9 then? A. Yes.

* * * *

EXTRAJUDICIAL STATEMENT OF CHARLES D. BOBLIT

July 9, 1958

I, Charles Donald Boblit make the following statement to Captain George W. Wellham, Sgt. Maxwell V. Frye, Jr. and Cpl. Bernard Kiessling who have identified themselves as members of the Anne Arundel County Police Department. Capt. Wellham, Sgt. Frye and Cpl. Kiessling have advised me that I do not have to make this statement and I know that any statement I make can be used against me in a court of law. No force, threats or promises have been made to get me to make this statement. I have been advised that I might be represented by a lawyer at any time.

Q. What is your full name? A. Charles Donald Boblit.

Q. Charles, you are the same Charles Donald Boblit who was arraigned before Mag. Delaba (sic) on July 3, 1958, at 10:00 A.M., at which time the crime you are charged with was read to you, is that correct? A. Yes.

Q. Charles, since you gave your last statement to us, certain evidence has been uncovered that indicates you might possibly have a few discrepancies in your previous statements. At this time we would like to ask you a few more questions to clear these up, is that satisfactory with you? A. Yes.

[fol. 43] Q. In previous statements you have indicated that John Leo Brady struck William Brooks in the head with the shot gun, is that correct? A. Yes.

Q. We would like to ask you at this time if John Leo Brady struck Mr. Brooks with the shot gun or did you? A. I did.

Q. Did you strike Mr. Brooks with the shot gun on the drive way to his home which is located at Hidden Village, Quarterfield Rd., Severn, Md. A. I don't know if it is hidden village or not but it was near Quarterfield Rd.

Q. Where was John Leo Brady when you struck Mr. Brooks? A. Standing off on the side of the road.

Q. This took place on June 27, 1958, is that correct? A. That is correct.

Q. Do you know what time this took place? A. It was about 12:30 or 12:45 that night.

Q. If it happened at 12:30 or 12:45 A.M. it would have been June 28, 1958, is that correct? A. That's correct.

Q. Also after you and John Leo Brady took Mr. Brooks in his car to where his body was later found, you indicated in your previous statements that John Leo Brady strangled Mr. Brooks with your shirt, is that correct? A. That's what I told you, yes.

Q. Do you wish to change this part of your statement? A. Yes.

Q. What did occur at the scene of the strangulation? A. Well he had the gun until then, no I had the gun. I had the gun and the shirt. Then he took the gun from me, that was after I said I would have to shot (sic) him. Brady said no, let's strangle him. That's when I took and twisted my shirt sleeve and choked him. Then we carried him back into the woods.

Q. Why did you tell Brady you would have to shot (sic) Mr. Brooks? A. Well that was right after Brady and I decided he would have to be killed.

[fol. 44] Q. Did you know Mr. Brooks? A. No, sir, I never saw him before in my life.

Q. Were you wearing the shirt, and take it off to strangle Mr. Brooks? A. No.

Q. Where was the shirt? A. Well when we were going down in the car the shirt was over the pistol.

Q. Where was the pistol? A. I had it in my hand.

Q. Did you choke Mr. Brooks while he was standing or did you knock him down and then choke him? A. I put the shirt around his neck while he was standing.

Q. Did you choke him until he fell or did you knock him down before you started choking him? A. I started choking him, he fell by himself.

Q. Charles, why didn't you tell us these things before? A. I don't know.

Q. Charles, since you struck Mr. Brooks in the head and also strangled him, could it be possible that you planned to rob Mr. Brooks and not Brady? A. No sir, I

didn't even know the man. It was his idea to hold him up and not mine and it was his idea to strangle him, I wanted to shot (sic) him.

Q. Is there anything else that is incorrect in your previous statements that you would like to correct at this time? A. Not as I know of.

Q. Is there anything else you would like to add to this statement? A. No.

Q. Is this statement true and correct to the best of your knowledge? A. It is.

Q. Will you sign this statement? A. Not before I see a lawyer.

Q. This entire statement of two pages will now be read to you, if it is correct will you answer by saying yes and then if you care to, you may sign this statement is that understood? A. Yes.

[fol. 45] Q. Is this statement the same as you answered us, or is there any errors that have been found while it was read to you? A. That's the way I gave it.

Q. Would you care to sign this statement? A. No.

Signed: .....
CHARLES DONALD BOBLIT

Witnessed:

/s/ CPL. BERNARD KIESSLING

Witnessed:

/s/ CAPT. GEORGE WELLHAM

/s/ SGT. MAXWELL V. FRYE, JR.

[fol. 45A]

* * * *

COURT'S INSTRUCTIONS TO JURY AT TRIAL OF CASE

Mr. Foreman and Members of the Jury, all the evidence is in in this case and counsel have argued both for the State and for this defendant the facts and the law applicable to the facts in the case. However, this being a criminal case, under our constitution and laws, the Jury are the judges of both the law and the facts. And the Court feels that even though there has been a confession by counsel for the defendant that this traverser is guilty of murder in the first degree without capital punishment, the Court feels that the Jury in order to properly evaluate the entire case should be given advisory instructions as to the law applicable to cases in which the indictment charges the crime of murder. The indictment in this case states as follows: "The Jurors of the State of Maryland for the body of Anne Arundel County do on their oath present that Charles D. Boblit and John L. Brady late of said county on or about twenty-eighth day of June in the year of our Lord nineteen hundred and fifty-eight at the county aforesaid feloniously, wilfully, and of deliberately premeditated malice aforethought did kill and murder William Brooks." The defendant in this case, John L. Brady, entered a plea of not guilty and elected to have his case tried by a jury.

The Court's comments in this case are advisory only, gentlemen of the jury, and in the final analysis the jury are the judges of both the law and the facts, and the verdict in this case is entirely the jury's responsibility. [fol. 45B] In dealing with the crime of murder every murder, or what we refer to as felonious homocide, is presumed to be murder in the second degree. And it is the burden of the State to prove and establish to the jury's satisfaction such facts and circumstances that would justify the jury in raising that charge from murder in the second degree to murder in the first degree. In Maryland murder is divided into two categories, murder in the first degree and murder in the second degree. There's

also another class of felonious homocide called manslaughter, which is not murder but a killing without malice.

Murder in the first degree, in order to establish that the State must prove to you beyond any reasonable doubt that the crime committed was wilful, deliberate and premeditated. It was done with the intention to inflict serious bodily harm and that death resulted from that intention. Malice does not mean necessarily hatred or ill-will, it simply means a wrongful intention to do serious bodily harm or to take human life without legal justification or excuse. Wherever there is murder there is malice. Aforethought simply means that the intention or design to take human life or to commit serious bodily harm to an individual existed prior to or at the time that the act resulting in the death of murder existed. The distinction between murder in the first degree and murder in the second degree can best be defined in this manner: murder in the first degree inspires a little bit of time, what we call premeditation, time to think about it, the act which [fol. 45C] is to be committed and not the killing on the spur of the moment or suddenly. Where the killing is on the spur of the moment or suddenly without any deliberation or premeditation or thinking about it in order to have the opportunity to make up one's mind over a little period of time, the law doesn't classify or indicate any specific period of time, that killing would be murder in the second degree because there would be no wilful, deliberate, premeditated killing. The other class of killing, which the Court has just referred, felonious homocide, in which there is no malice, that is, a killing results where there is no intention to take human life, either done in the heat of passion, suddenly without any intention, probably in a fight or in some altercation in which unfortunately some one is injured and death results there from. But the distinction between murder and malice is, specifically, that wherever there's murder there is malice, wherever there is manslaughter there is an absence of malice. And as the Court defined it a few moments ago, malice means the wrongful intention, scheme, plan or design to inflict serious bodily harm resulting in death without any legal

justification or excuse. In this case we have other circumstances to which the STATE'S ATTORNEY referred in reading the statute applicable thereto. And the statute provides that where, if the jury finds, there is a perpetration of the crime of robbery and as a result of the perpetration of that crime the circumstances are so inter-related or linked together that there was a killing resulting [fol. 45D] from that robbery, the Jury would have a right under the statute to bring in a verdict of murder in the first degree. Correspondingly, there is some testimony in this case which the jury may consider and the State's Attorney read that relating to the law relative to killing or murder in the mannor of poison or lying in wait. The Jury should take into consideration in its determination as to the degree of offense in this case, the circumstances surrounding the placing of the log in this road and the related details as narrated in the evidence presented.

In this case anyone of five verdicts may be rendered by the Jury. The Court has written them out on a piece of paper in order that the Jury may have them available after you've deliberated and arrived at a verdict. The first, the Jury may bring in a verdict of guilty of murder in the first degree, if that is the verdict of the jury then it's duty of the Court to determine the sentence which may be imposed, and under our law the sentence will either be the sentence of death by confinement in the gas chamber, that having superseded the earlier method of punishment by hanging, or life imprisonment in the Maryland Penetentiary. The second possible verdict is guilty of murder in the first degree without capital punishment, under that verdict automatically the Court is required by law to impose the penalty of confinement in the Maryland Penetentiary for the period of the natural life of the person found guilty of murder of first degree without capital punishment. The third, is not guilty of murder in the first degree but guilty [fol. 45E] of murder in the second degree, under that verdict the Court would be required to impose the penalty not to exceed eighteen years. Under No. 4, the Jury may bring in a verdict of not guilty of murder but guilty of manslaughter, the maximum penalty that may be imposed

in that case would be ten years. And fifth, the verdict, if the Jury so finds that the defendant is not guilty.

Gentlemen, that concludes the Court's instructions, in view of the concession of counsel for defense. If there are no exceptions then swear the bailiff.

Gentlemen of the Jury, in view of the fact that it's close to lunch time, Court feels that perhaps it would be better that the Sheriff take you to lunch and return as soon as you can, perhaps at 1 o'clock, and then continue your deliberation and endeavor to reach a verdict.

Sheriff, take charge of this Jury and keep them together, take them to lunch and return them here not later than 1 o'clock. Court will take a recess 'til 1 o'clock.

[fol. 46]

IN THE COURT OF APPEALS OF MARYLAND

September Term, 1961

No. 135

JOHN L. BRADY

v.

STATE OF MARYLAND

Brune, C. J.,
Henderson,
Prescott,
Horney,
Marbury,
JJ.

OPINION BY BRUNE, C. J.—October 11, 1961

[fol. 47] On this appeal from a denial of post conviction relief, the appellant, Brady, contends that he was deprived of a fair trial by reason of the fact that the State did not disclose at or before the trial that it then had in its possession a statement of his accomplice Boblit admitting that he, Boblit, had actually strangled the victim.

Boblit and Brady were each convicted of first degree murder in separate trials. Brady elected a jury trial and was tried first; Boblit elected a court trial. Each appealed from his conviction and the cases were argued together in this Court, and each of the convictions was affirmed on appeal, *sub nom. Boblit* v. *State*, 220 Md. 454, 154 A. 2d 434. It was conceded that Boblit conspired with Brady

to rob the victim, Brooks, but each claimed that the other had actually strangled Brooks and that the killing was separate and distinct from the robbery. We held otherwise, pointing out that the robbery was not complete at the time Brooks was killed, although Boblit contended on appeal that he did not actively assist Brady in strangling the victim. The sole contention raised on behalf of Brady related to the voluntariness of his confession, in which he admitted participation but denied killing Brooks, although, as pointed out in the opinion, he took the stand and admitted virtually everything set forth in his confession. On this appeal, Brady concedes that "[a]t his trial the appellant [Brady] admitted participation in the robbery in the course of which the homocide occurred." As we held [fol. 48] on the original appeals of Boblit and Brady, the killing was clearly in perpetration of the robbery and hence covered by the statute, Code (1957), Art. 27, Sec. 410, which defines such a killing as murder in the first degree.

Brady subsequently filed a motion to set aside the judgment and sentence on the ground that an unsigned statement given to the police by Boblit, of which he claims he had no knowledge until after the affirmance on his appeal, although it was produced at the trial of Boblit, would have corroborated his testimony that Boblit did the actual killing. We dismissed his appeal from the denial of that motion on the ground that his only relief was under the Post Conviction Act, Code (1960 Supp.), Art. 27, Sec. 645A, *et seq.* *Brady* v. *State*, 222 Md. 442, 160 A. 2d 912.

Brady then applied for post conviction relief, and his application was denied after a full hearing, his application being on substantially the same grounds. The trial court filed an elaborate opinion holding that there had been no denial of a constitutional right. We granted leave to appeal. Md. , A. 2d

At the trial of Boblit the State offered the unsigned statement of Boblit in which he admitted strangling the victim. The court excluded it because it was unsigned.[1]

[1] See *Hall* v. *State*, 223 Md. 158, 162 A. 2d 751, decided after the trial of Boblit's case and reaching an opposite result.

In several prior statements Boblit had stated that Brady did the killing and so testified on the stand. These state- [fol. 49] ments were made available to Brady's counsel before trial, but the one in which Boblit said that he had done the actual killing was not so made available. At the trial of Brady the unsigned statement of Boblit was not produced by the State nor offered in evidence. This trial, as noted, took place before the trial of Boblit. The State knew in advance of Brady's trial that Brady's chief reliance was upon the hope that the jury might find him guilty of first degree murder without capital punishment if it believed his testimony that Boblit did the killing. The importance of this consideration was stressed in the case of *Day* v. *State*, 196 Md. 384, 391, 76 A. 2d 729. See also *United States ex rel. Almeida* v. *Baldi*, 195 F. 2d 815 (3d Cir.), cert. den., 345 U.S. 904; rehearing den., 345 U.S. 946; *United States ex rel. Thompson* v. *Dye*, 221 F. 2d 763 (3d Cir.), cert. den. 350 U.S. 875.

We think that there was a duty on the State to produce the confession of Boblit that he did the actual strangling or at least to inform counsel for the accused of its existence. The suppression or withholding by the State of material evidence exculpatory to an accused is a violation of due process. See *People* v. *Fisher*, 192 N.Y.S. 2d 741, 746 (Ct. Gen. Sess. N.Y. Co.); *United States ex rel. Almeida* v. *Baldi, supra; United States ex rel. Thompson* v. *Dye, supra; Griffin* v. *United States*, 87 U.S. App. D.C. 172, 183 F. 2d 990. For cases involving the related problem of the prosecution's failing to correct testimony known to be untrue, and holding such failure and the use of such testimony to amount to a denial of due process, [fol. 50] see *Alcorta* v. *Texas*, 355 U.S. 28; *Napue* v. *Illinois*, 360 U.S. 264; *People* v. *Savvides*, 1 N.Y. 2d 554, 136 N.E. 2d 853 (non-disclosure and failure to correct untrue testimony as denying a fair trial). It is none the less a denial of due process if the withholding of material evidence is without guile (*Griffin* v. *United States*; *People* v. *Savvides;* both just cited) but it seems fair to add, that the appellant here does not contend that failure to produce Boblit's statement in issue was the result of guile.

The State contends that Boblit's confession of the actual strangling would not have been admissible at Brady's trial and hence that its being withheld could not have prejudiced Brady's case. It is true that as a general rule an extrajudicial confession or admission by a third party that he committed the offense for which the defendant is on trial is not admissible. *Muashower* v. *State*, 55 Md. 11; *Bachr* v. *State*, 136 Md. 128, 110 A. 103; and this has been recognized in *Brennan* v. *State*, 151 Md. 265, 134 A. 148, and in *Thomas* v. *State*, 186 Md. 446, 47 A. 2d 43. This general rule, which is the majority rule in this country as well as the rule in England, has been severely criticized, notably in Mr. Justice Holmes' brief and pointed dissent in *Donnelly* v. *United States*, 228 U.S. 243, at 277-278, and in 5 Wigmore, *Evidence* (3rd ed.) §§ 1476, 1477, and McCormick, *Evidence*, § 255. The A.L.I. *Model Code of Evidence*, § 509, rejects it.

Both the *Brennan* and the *Thomas* cases recognized that the rule is not without exception and have limited its operation. It has also been at least limited, so as not [fol. 51] to be an absolute rule, in some other jurisdictions. *Hines* v. *Commonwealth*, 136 Va. 728, 117 S.E. 843; *Newberry* v. *Commonwealth*, 191 Va. 445, 460-462, 61 S.E. 2d 318, 325-326 (co-defendant's confession exculpating defendant); *Sutter* v. *Easterly*, 354 Mo. 282, 189 S.W. 2d 284; *Osborne* v. *Purdome*, 250 S.W. 2d 159 (Mo.), (following the *Sutter* case after an intervening case in which *Sutter* had not been applied, *State* v. *Gordon*, 356 Mo. 1010, 204 S.W. 2d 713); *People* v. *Lettrich*, 413 Ill. 172, 108 N.E. 2d 488; *Cameron* v. *State*, 153 Tex. Cr. Rep. 29, 217 S.W. 2d 23. Some cases emphasize the unavailability of the declarant as a witness, and in *Newberry* v. *Commonwealth*, *supra*, his refusal to testify was held to amount to unavailability.

In *Thomas* v. *State*, *supra*, 186 Md. at 452, Judge Delaplaine, speaking for the Court said: "[W]e hold that where a witness has made a written confession that he committed the crime with which the defendant is charged, the defendant should be allowed to introduce the confession in evidence and question him in regard to the confession and the circumstances under which he made it. We further hold that where in a criminal case an

officer has secured contradictory confessions from two different persons, the defense should be permitted to question him about both confessions and we further hold that such a confession by a third party is admissible unless it appears that there was some collusion in obtaining it." [fol. 52] The reasons for the adoption of the general rule and also for the development of exceptions to it or limitations upon it all rest in large measure upon concern for the trustworthiness of the declaration against interest proposed to be offered; and certainly this weighs heavily in the criticisms of the general rule. See the passages in Wigmore and McCormick above referred to, Mr. Justice Holmes' dissent in *Donnelly* v. *United States*, *supra*; *People* v. *Lettrich*, *supra*, 108 N.E. 2d at 491-492; and the *Brennan* and *Thomas* cases in this Court. Certainly since the decisions of those cases, the rule of the *Munshower* case cannot be said to be of universal application. We think that Boblit's undisclosed confession might have been usable under any of the three rules stated in *Thomas*, which we have quoted above, and hence could not be regarded as inadmissible and unusable in any manner in Brady's defense.

Brady might have called Boblit as a witness. If he had testified, the first holding of *Thomas* would have permitted his cross-examination about that confession. The only difference then would have been that this confession of Boblit's was unsigned and hence not strictly a written confession; but under *Hall* v. *State*, 223 Md. 158, 162 A. 2d 751, that difference would not seem controlling. If, as might well have been the case, Boblit had stood on his privilege and refused to testify, Brady might then have interrogated the police officers who had taken Boblit's statement; and it seems that there was no collusion as between Boblit and Brady with regard to this confession. Their interests were opposed to the extent that [fol. 53] the question of which one did the actual strangling was material, their interrogations were separate and it appears that they had been kept apart. No reason or inducement for Boblit to take this blame for Brady is apparent. To what extent a confession or admission of a third party is free of collusion and bears the indicia of trustworthiness is a question which we think should be

entrusted in the first instance to the sound discretion of the trial judge. Certainly, the "confession" of a crackpot, anonymous or otherwise (and such "confessions" are not uncommon in cases of wide notoriety), would not bear any hallmark of trustworthiness, and would not call for the application of the second or third rules of the *Thomas* case.

There is considerable doubt as to how much good Boblit's undisclosed confession would have done Brady if it had been before the jury. It clearly implicated Brady as being the one who wanted to strangle the victim, Brooks. Boblit, according to this statement, also favored killing him, but he wanted to do it by shooting. We cannot put ourselves in the place of the jury and assume what their views would have been as to whether it did or did not matter whether it was Brady's hands or Boblit's hands that twisted the shirt about the victim's neck. To apply the words of the Supreme Court of the United States in *Griffin* v. *United States*, 336 U.S. 704 at 708-709, quoted by the Court of Appeals of the District of [fol. 54] Columbia Circuit in its opinion on remand of the case, above cited (183 F. 2d at 992), it seems to us (as it did to the Court of Appeals of the District in *Griffin*) that it would be "too dogmatic" for us to say that the jury would not have attached any significance to this evidence in considering the punishment of the defendant Brady.

Not without some doubt, we conclude that the withholding of this particular confession of Boblit's was prejudicial to the defendant Brady. Having arrived at the conclusions that it was prejudicial and that he was deprived of a constitutional right, we turn to the question of appropriate relief under the Uniform Post Conviction Procedure Act (Code (1960, Cum. Supp.), Art. 27, Secs. 645A-645J). The section dealing with the kind of relief to be granted is Sec. 645G, which reads in part as follows: "If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings, and any supplementary orders as to * * * retrial, * * * correction of sentence, or other matters that may be necessary and

proper." Our own Rule 870 (of the Maryland Rules) provides that this Court will (with exceptions not here pertinent) affirm or reverse the judgment appealed from, or direct the manner in which it shall be modified, changed or amended.

The appellant's sole claim of prejudice goes to the punishment imposed. If Boblit's withheld confession had been before the jury, nothing in it could have reduced the appellant Brady's offense below murder in the first de- [fol. 55] gree. We, therefore, see no occasion to retry that issue. Brady is entitled to have a jury empaneled to determine whether the finding already made of guilty of murder in the first degree should or should not be modified by the addition of the words "without capital punishment"; and to that end any admissible evidence bearing on that question should be submitted to the jury which either the State or the defendant may deem it appropriate to present. This may require to a large extent a duplication of the evidence submitted at the first trial, and it will permit the defendant to make such use of the withheld Boblit confession as he may desire and as may be appropriate under our decision in this case. We do not now undertake to pass upon any question of privilege, should Boblit be called as a witness and should he assert any claim of privilege against testifying. Should the jury decline to add the words "without capital punishment", sentence will be for the determination of the court on the basis of the evidence produced on the rehearing. If the jury should add those words, life imprisonment is mandatory under Code (1957), Art. 27, Sec. 413.

In accordance with the above views the judgment appealed from is reversed and the case is remanded with instructions to enter an order, not inconsistent with this opinion, for a new trial on the question of punishment only.

Judgment Reversed and Case Remanded for the Entry of an Order Not Inconsistent With This Opinion for a New Trial on the Question of Punishment Only.

[fol. 56]

IN THE COURT OF APPEALS OF MARYLAND

No. 135, September Term, 1961

JOHN L. BRADY

v.

STATE OF MARYLAND

Appeal from the Circuit Court for Anne Arundel County. (Transferred from Post Conviction Application No. 9—1961 Term)

Filed: July 7, 1961.

October 11, 1961: Judgment reversed and case remanded for the entry of an order not inconsistent with this opinion for a new trial on the question of punishment only. Op. Brune, C. J.

MANDATE

STATEMENT OF COSTS

In Circuit Court:

Record
Stenographer's Costs

In Court of Appeals:

Filing Record on Appeal	
Printing Brief for Appellant	$362.45
Reply Brief	
Portion of Record Extract—Appellant	
Appearance Fee—Appellant	10.00
Printing Brief for Appellee	94.55
Portion of Record Extract—Appellee	
Appearance Fee—Appellee	10.00

STATE OF MARYLAND, Set:

I do hereby certify that the foregoing is truly taken from the record and proceedings of the said Court of Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Appeals, this tenth day of November A. D. 1961.

/s/ J. Lloyd Young
Clerk of the Court of Appeals of Maryland.

Costs shown on this Mandate are to be settled between counsel and *NOT THROUGH THIS OFFICE*

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 58]

SUPREME COURT OF THE UNITED STATES

No. , *October Term, 1961.*

JOHN L. BRADY, PETITIONER

vs.

WARDEN OF THE MARYLAND PENITENTARY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—February 9, 1962

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 9, 1962.

Stewart

/s/ Potter ~~Thurmond~~

Associate Justice of the Supreme Court of the United States.

Dated this 9th day of February 1962.

[fol. 59]

SUPREME COURT OF THE UNITED STATES

No. 47 Misc., October Term, 1962

JOHN L. BRADY, PETITIONER

vs.

MARYLAND

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals of the State of Maryland.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—October 8, 1962

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 490 and placed on the summary calendar.

Mr. Justice Goldberg took no part in the consideration or decision of this motion and petition.

U. S. GOVERNMENT PRINTING OFFICE, 1962 666512 5b4

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 26 1962
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 490

JOHN L. BRADY,

Petitioner,

vs.

WARDEN OF MARYLAND PENITENTIARY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND
AND TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY
OF THE STATE OF MARYLAND

BRIEF FOR THE PETITIONER

E. Clinton Bamberger, Jr.
John Martin Jones, Jr.
900 First National Bank Bldg.
Baltimore 2, Maryland
Counsel for Petitioner

INDEX

SUBJECT INDEX

BRIEF FOR PETITIONER	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Constitutional Provisions, Statutes and Rules of Practice and Procedure Involved	2
Statement of the Case	3
Summary of Argument	5
Argument:	
I. The failure to set aside the verdict denies equal protection of the laws because it subjects the petitioner to a unique and prejudicial variation of criminal procedure	6
II. The denial of due process of law vitiated the entire proceeding. The verdict of guilt cannot stand	10
CONCLUSION	13
APPENDIX—Constitutional Provisions, Statutes and Rules of Practice and Procedure Involved	15

CITATIONS

CASES:

Blackburn v. *Alabama*, 361 U.S. 199	10
Boblit v. *State*, 220 Md. 454, 154 A. 2d 434	3
Brady v. *State*, 222 Md. 442, 160 A. 2d 912	4
Brady v. *State*, 226 Md. 422, 174 A. 2d 167	5
Commonwealth v. *Burke*, 361 Pa. 35, 63 A. 2d 77, *cert. denied*, 340 U.S. 915	11
Culombe v. *Connecticut*, 367 U.S. 568	6, 10
Day v. *State*, 196 Md. 384, 76 A. 2d 729	12
Dowd v. *United States*, 340 U.S. 206	5, 8
Fay v. *New York*, 332 U.S. 261	5, 8

	Page
Foulke v. *Burke*, 342 U.S. 881	11
Giles v. *State*, 229 Md. 370, 183 A. 2d 359	7
Griffin v. *Illinois*, 351 U.S. 12	5, 8
Griffin v. *United States*, 336 U.S. 704	10
Jankowski v. *Burke*, 342 U.S. 881	11
Keenan v. *Burke*, 342 U.S. 881	11
Napue v. *Illinois*, 360 U.S. 264	10
Payne v. *Arkansas*, 356 U.S. 560	10
Rogers v. *Richmond*, 365 U.S. 534	6, 10
Slansky v. *State*, 192 Md. 94, 63 A. 2d 599	7
Sparf v. *United States*, 156 U.S. 51	9
Stroble v. *California*, 343 U.S. 181	11
Townsend v. *Burke*, 334 U.S. 736	6, 11
United Brotherhood v. *United States*, 330 U.S. 395	9
United States v. *Baldi*, 104 F. Supp. 321, affirmed 195 F. 2d 815, *cert. denied*, 345 U.S. 904, *reh. denied*, 345 U.S. 946	11
Vogel v. *State*, 163 Md. 267, 162 A. 705	7

CONSTITUTIONAL PROVISIONS:

Constitution of the United States, Fourteenth Amendment	2
Constitution of Maryland, Article XV, Section 5	2, 3, 7, 9, 12

STATUTES:

28 U.S.C. § 1257 (3)	2
Annotated Code of Maryland	
Article 27, Section 387	6
Article 27, Section 410	2, 3, 6
Article 27, Section 413	2, 3, 6
Article 27, Section 414	6
Article 27, Section 645 G	3

RULES OF PRACTICE AND PROCEDURE OF THE COURT OF APPEALS OF MARYLAND

Rule 756b	3, 9, 11, 12
Rule 756e	3, 9, 11, 12

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 490

JOHN L. BRADY,

Petitioner,

vs.

WARDEN OF MARYLAND PENITENTIARY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND AND TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY OF THE STATE OF MARYLAND

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Court of Appeals of Maryland is reported in 226 Md. 422 and in 174 A. 2d 167 and is included in the Transcript of Record (R. 46-52).

Jurisdiction

The opinion of the Court of Appeals of Maryland was filed on October 11, 1961 and the mandate of that Court was filed on November 10, 1961 (R. 53-54). The time within which to petition for certiorari was extended until April

9, 1962 by order of Mr. Justice Stewart dated February 9, 1962 (R. 55). The petition was filed April 7, 1962 and was granted October 8, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3) since a right, privilege or immunity is claimed under the Constitution of the United States.

Question Presented

The petitioner was found guilty of murder in the first degree and sentenced to death. In a post-conviction proceeding the Court of Appeals of Maryland held that suppression of evidence by the State denied due process of law to the petitioner. Although the petitioner sought a complete new trial, the Court of Appeals remanded the case for a new trial only on the question of punishment and not on the issue of guilt. The question presented is:

Whether the restriction of the petitioner's new trial to the question of punishment and the denial of a re-trial of guilt denies the petitioner's constitutional rights.

Constitutional Provisions, Statutes and Rules of Practice and Procedure Involved

The constitutional provisions, statutes and rules of practice and procedure involved are set forth in the Appendix to this brief. The constitutional provisions involved are: Section 1 of the Fourteenth Amendment of the Constitution of the United States and Article XV, Section 5, Constitution of Maryland, Volume 9, Annotated Code of Maryland (1957 ed.), page 199. The statutes involved are: Article 27, Section 410, Volume 3, Annotated Code of Maryland (1957 ed.), page 172; Article 27, Section 413, Volume 3, Annotated Code of Maryland (1957 ed.), page 173 and

Article 27, Section 645 G, Volume 3, Annotated Code of Maryland (1961 Cumulative Supplement). The Rules of Practice and Procedure of the Court of Appeals of Maryland involved are: Maryland Rule 756b, Maryland Rules of Procedure (1961 edition), page 283; and Maryland Rule 756e, Maryland Rules of Procedure (1961 edition), page 284.

Statement of the Case

In Maryland, murder committed in the perpetration of a robbery is murder in the first degree. Article 27, Section 410, Volume 3, Annotated Code of Maryland (1957 ed.), page 172 (Appendix, p. 15). The punishment for murder in the first degree in Maryland is life imprisonment or death by gas and the jury may restrict the maximum punishment to imprisonment for life by the addition of the words "without capital punishment" to its verdict. Article 27, Section 413, Volume 3, Annotated Code of Maryland (1957 ed.), p. 173 (Appendix, p. 16). In Maryland the jury in a criminal case are " . . . the Judges of Law, as well as of fact, . . . ". Article XV, Section 5, Constitution of Maryland, Volume 9, Annotated Code of Maryland (1957 ed.), p. 199 (Appendix, p. 15).

In separate trials in the Circuit Court for Anne Arundel County the petitioner and a companion, Charles Donald Boblit, were found guilty of murder in the first degree and sentenced to suffer the penalty of death. The convictions were affirmed in a single opinion by the Court of Appeals of Maryland. *Boblit* v. *State*, 220 Md. 454, 154 A. 2d 434.

In extra-judicial statements to the police prior to his trial and in testimony at his trial, the petitioner denied

that he had murdered the victim. He blamed his companion, Boblit, with whom the petitioner admitted participation in the robbery of the victim. Prior to petitioner's trial his counsel had requested from the State's Attorney the opportunity to examine the extra-judicial statements made by the other defendant, Boblit (R. 24, 25, 28, 37 and 38). Counsel was shown several statements made by the petitioner and by Boblit but counsel was not shown an unsigned statement by Boblit dated July 9, 1958 (R. 39-41) in which Boblit admitted the actual homicide (R. 24, 25, 28 and 29). After the conviction and sentencing of the petitioner the State offered as evidence in the later trial of Boblit the extra-judicial statement (R. 39-41) in which Boblit admitted the murder of the victim. The petitioner and his counsel first learned of the existence of Boblit's statement of July 9, 1958 after the affirmance of the petitioner's conviction (R. 23, 24 and 34).

After the affirmance in the Court of Appeals of Maryland the petitioner moved the Circuit Court for Anne Arundel County to set aside the verdict and the sentence and to grant him a new trial on the ground that evidence newly discovered by him had been suppressed by the State. The petitioner's appeal from the Circuit Court's denial of the motion was dismissed by the Court of Appeals of Maryland without prejudice to the petitioner to seek relief under the Maryland Post Conviction Procedure Act. *Brady* v. *State*, 222 Md. 442, 160 A. 2d 912. The subsequent petition for post conviction relief was dismissed by the Circuit Court for Anne Arundel County (R. 2-15) and the Court of Appeals of Maryland granted leave to appeal.

The Court of Appeals held that suppression of evidence by the State denied due process of law to the petitioner. The case was remanded but only for a re-trial of the question of punishment without setting aside the

verdict of guilt and ordering a re-trial of that issue also. *Brady* v. *State*, 226 Md. 422, 174 A. 2d 167 (R. 46-52). The order of the Court of Appeals of Maryland states: "Judgment reversed and case remanded for the entry of an order not inconsistent with this opinion for a new trial on the question of punishment only." (R. 53).

The petition for post conviction relief prayed that the verdict and sentence be stricken and that the petitioner be granted a new trial. At the conclusion of oral argument in the Court of Appeals the Chief Judge asked counsel for the petitioner what relief he sought if the Court found that the petitioner had been denied due process and specifically whether he sought a re-trial of the issue of punishment only and not guilt also. Counsel replied that he sought a new trial of the entire case and both issues, guilt and punishment.

Summary of Argument

I.

The petitioner will never have a jury trial of his guilt or innocence with the suppressed evidence available to him. Other defendants will have such evidence to use in the trial by jury of guilt or innocence. Equal protection of the laws forbids such a unique, prejudicial, discriminatory and disparate proceeding. *Fay* v. *New York*, 332 U.S. 261, 285; *Dowd* v. *United States*, 340 U.S. 206, 209; *Griffin* v. *Illinois*, 351 U.S. 12, 17. The order of the Court of Appeals denies equal protection of the laws by restricting the petitioner's new trial to the issue of punishment.

II.

The petitioner was denied due process of law by the State's suppression of evidence before his trial began. The proceeding must commence again from the stage at which the petitioner was overreached. The denial of due process of law vitiated the verdict and the sentence. *Rogers* v. *Richmond*, 365 U.S. 534, 545. The verdict is not saved because other competent evidence would support it. *Culombe* v. *Connecticut*, 367 U.S. 568, 621. Even the false assumption that the suppressed evidence could affect only the jury's deliberation on the sentence, is not justification for the failure to set aside the tainted verdict. *Townsend* v. *Burke*, 334 U.S. 736. The order of the Court of Appeals denies due process of law by its failure to strike the verdict as well as the sentence.

ARGUMENT

I.

The Failure to Set Aside the Verdict Denies Equal Protection of the Laws Because It Subjects the Petitioner to a Unique and Prejudicial Variation of Criminal Procedure.

In Maryland, a homicide committed in the perpetration of a robbery is murder in the first degree punishable by death or life imprisonment. The maximum punishment for second degree murder is imprisonment for eighteen years and the maximum punishment for manslaughter is imprisonment for ten years.[1]

A Maryland jury is not obliged to convict a defendant of first degree murder even if the uncontradicted evidence

[1] Article 27, Sections 410, 413, 414 and 387, Volume 3, Annotated Code of Maryland (1957 ed.), pages 172, 173, 174 and 164.

or his own testimony would support the conviction. A Maryland jury in a criminal case are the " . . . Judges of Law, as well as of fact, . . . ". Article XV, Section 5, Constitution of Maryland, Volume 9, Annotated Code of Maryland (1957 ed.) p. 199 (Appendix, p. 15). The Court of Appeals of Maryland has reiterated that this constitutional provision grants the jury the *right*, and not merely the power, to determine the applicable law; even contrary to instructions by the Court, which are merely advisory.[2] The Court before which the petitioner was tried recognized this rule when it instructed the jury that it could find five possible verdicts, including second degree murder, manslaughter and acquittal (R. 44-45).

Unlike all other defendants, the petitioner is denied a trial of guilt with the suppressed evidence available to him before a jury with the *right* to find him guilty of a crime less than first degree murder or even acquit him. The opinion of the Court of Appeals acknowledges that the petitioner should have had a trial with the prior knowledge of the suppressed evidence and guarantees that others accused will have such a trial. The mandate of the court denies such a trial for this accused. The Court of Appeals does not recognize this discrimination and so asserts no reasonable basis for it. There is no reasonable premise for the prejudicial segregation of the petitioner from others accused. There is no reasonable basis for the imposition upon the defendant of a finding of guilt after an unfair trial in which evidence was suppressed and due process of law denied.

---

[2] *Vogel* v. *State*, 163 Md. 267, 272, 162 A. 705, 707; *Slansky* v. *State*, 192 Md. 94, 108, 63 A. 2d 599, 605; *Giles* v. *State*, 229 Md. 370, 183 A. 2d 359. Sources of the history of the Maryland constitutional provisions and discussions of the distinction between the power and the right of the jury in a criminal case to determine the law are cited in the *Giles* opinion in footnote 6, 229 Md. at page 385, 183 A. 2d at page 366.

If this petitioner would be tried for the first time tomorrow, he would have the suppressed evidence and the benefit of the knowledge of that evidence before the trial of his guilt. The proceedings against him would be the same as the trial of any other defendant in Maryland in similar circumstances. This is not the same proceeding as the new trial ordered by the Court of Appeals for the petitioner restricted to the issue of punishment and with guilt prejudged. Similitude between the petitioner and others before the bar is absent because the Court of Appeals refused the petitioner a trial of his guilt with prior knowledge of the suppressed evidence. No State may impress such a discriminatory restriction upon the right of an accused to a fair trial according to the procedure prevailing in ordinary cases. Similitude of proceedings is equal protection of the laws and the mandate of the Court of Appeals contravenes that constitutional guarantee. Equal protection of the laws forbids the prejudicial disparity imposed upon the petitioner. *Fay* v. *New York*, 332 U.S. 261, 285; *Griffin* v. *Illinois*, 351 U.S. 12, 17. Nothing short of a determination of guilt and punishment by a jury judging the law and the fact " . . . according to the procedure prevailing in ordinary cases . . . ", i.e. a complete new trial for the petitioner, will cure the denial of equal protection of the laws. *Dowd* v. *United States*, 340 U.S. 206, 209.

The unique, prejudicial proceeding against the petitioner is not justified by an argument that the evidence could not affect the jury's verdict of guilt. The Court of Appeals may not rule as a matter of law that the jury with the suppressed evidence or the fruit of it introduced at the trial would not have the right to find the petitioner guilty of a lesser crime than murder in the first degree or acquit him. That court did not have the right to say in its opinion that " . . . nothing in (the suppressed confession)

could have reduced the appellant Brady's offense below murder in the first degree." (R. 52). The jury is the sole judge of the law and the instructions of the court are advisory only. Article XV, Section 5, Constitution of Maryland, Volume 9, Annotated Code of Maryland (1957 ed.) p. 199 (Appendix, p. 15); Maryland Rules 756b and 756e, Maryland Rules of Procedure, 1961 Edition, pp. 283 and 284 (Appendix, p. 17). If, as urged in the succeeding argument, the denial of due process of law vitiated the conviction, the petitioner has not had his guilt lawfully adjudged by a jury and no court in a criminal case is competent to instruct the jury to find a defendant guilty. *Sparf* v. *United States*, 156 U.S. 51, 105; *United Brotherhood* v. *United States*, 330 U.S. 395, 408.

The Court of Appeals was not at liberty to speculate on the gain the petitioner might have made with the suppressed evidence. It may not now serve a useful purpose to speculate except to establish that the evidence would have some value. The petitioner might have sought a trial to follow the trial of the co-defendant so that the co-defendant could be called as a witness without the shield of the privilege against self-incrimination. The co-defendant might then have admitted at the petitioner's trial the truth of the suppressed evidence, i.e. that the co-defendant was the actual murderer. A Maryland jury with this evidence before it might have found the petitioner guilty of a lesser degree of homicide or acquitted him. Even this speculation answers an irrelevant charge that the suppressed evidence and the knowledge of it could not affect the verdict of the petitioner's guilt.

There is no rational basis for the unique and prejudicial restriction imposed upon the petitioner. The order of the Court of Appeals denies to the petitioner equal protection of the laws and should be corrected by this Court.

II.

The Denial of Due Process of Law Vitiated the Entire Proceeding. The Verdict of Guilt Cannot Stand.

Nothing less than a fair trial from beginning to end will afford petitioner the due process of law the Court of Appeals found he was denied. The petitioner was overreached before his trial began when the State refused to tell him of the co-defendant's statement. From the moment of that suppression the whole of petitioner's trial was unfair, he had no trial, and the proceeding to which he was subjected was a nullity. That suppression occurred before the petitioner was found guilty and before he was sentenced. But the Court of Appeals would let the unfair verdict stand. If the petitioner has no more now than a re-trial of the issue of sentencing he will never have a fair trial of his guilt. The re-submission of only the sentencing issue leaves the petitioner convicted by an unfair trial.

When the Court of Appeals found that the petitioner had been deprived of due process of law, that court was not free to speculate upon what part of the trial might not have been tainted by the State's suppression of evidence. *Griffin* v. *United States*, 336 U.S. 704, 708-709; *Blackburn* v. *Alabama*, 361 U.S. 199, 206. The trial and every part of it can not stand because the suppressed confession "may have had an effect on the outcome of the trial." *Napue* v. *Illinois*, 360 U.S. 264, 272. An "error of constitutional dimension" in a criminal trial vitiates the entire proceeding. *Rogers* v. *Richmond*, 365 U.S. 534, 545. It does not matter that admissions by the petitioner or other competent evidence might support a guilty verdict even with the suppressed confession of the co-defendant in the record. *Payne* v. *Arkansas*, 356 U.S. 560, 567-568; *Culombe* v. *Connecticut*, 367 U.S. 568, 621.

The petitioner was entitled to the suppressed evidence when he requested it before the trial. The State's proceeding against the petitioner must begin again from the stage of the wrongful suppression. Nothing after that is now valid. What use the petitioner might have made of the knowledge wrongfully denied him or what profit he might have gained by it may not be assumed. Even if that assumption might be made, such a substantial error spoils all it touches. Infringements upon constitutional rights may never be so lightly regarded. *Stroble* v. *California*, 343 U.S. 181, 190. Even the false assumption that the suppressed evidence could affect only the jury's deliberation upon the sentence cannot justify a restriction of the remedy to a new trial on that issue alone. When constitutional rights were denied by the sentencing court after a plea of guilty, made and received without error, this Court struck down the conviction as well as the sentence. *Townsend* v. *Burke*, 334 U.S. 736. The Supreme Court of Pennsylvania questioned the scope of the *Townsend* opinion and resolved, after briefs and argument, that the petitioner there was entitled to another full trial of guilt and punishment, though the error occurred at sentencing. *Commonwealth* v. *Burke*, 361 Pa. 35, 63 A. 2d 77, *cert. denied*, 340 U.S. 915. This Court set the matter to rest in *Keenan* v. *Burke*, *Jankowski* v. *Burke* and *Foulke* v. *Burke*, 342 U.S. 881.

In *United States* v. *Baldi*, 104 F. Supp. 321, 328 (E.D. Pa.), the defendant was denied due process of law by the State's suppression of evidence relevant only to the degree of punishment for felony murder. The court set aside the " . . . *trial, verdict, conviction* and judgment of sentence . . . " and granted the writ of habeas corpus. (Emphasis supplied.) The decision was affirmed by the Court of Appeals in *United States* v. *Baldi*, 195 F. 2d 815 (C.A. 3), *cert. denied* 345 U.S. 904, *reh. denied* 345 U.S. 946. Al-

though the Pennsylvania jury would be bound by the court's instruction of the law of felony murder, the conviction unaffected by the suppressed evidence did not survive. The Maryland jury has the power and the right to judge the law and the court's instruction cannot bind it. Article XV, Section 5, Constitution of Maryland, Volume 9, Annotated Code of Maryland (1957 ed.), p. 199 (Appendix, p. 15); Maryland Rules 756b and 756e, Maryland Rules of Procedure, 1961 Edition, pp. 283 and 284 (Appendix, p. 17). No Maryland court has the right to judge the effect of the suppressed evidence because the jury is its own source of law.

The sole thrust of the petitioner's defense was that not he but his companion was the actual murderer. The suppressed confession of his companion would be persuasive evidence before the jury. That confession might have convinced the jury, as the judge of the law and the fact, to find the petitioner guilty only of a lesser degree of homicide or even to acquit him. The trial court instructed the jury, deliberating without the co-defendant's admission in evidence, that the jury could acquit the petitioner or find him guilty of a degree of murder less than first degree (R. 44-45).[3]

A trial with the suppressed evidence before a jury with the right to judge the law and the fact of the petitioner's guilt and punishment is the trial to which due process of

[3] The Court of Appeals of Maryland granted full relief in its previous opinion in *Day* v. *State*, 196 Md. 384, 76 A. 2d 729. Two defendants were convicted of felony murder. Each admitted the robbery but accused the other of the homicide. The defendants appealed from the trial court's denial of a severance. The State argued on appeal that neither defendant was harmed by the joint trial because the admission of the robbery was an admission of guilt of felony murder. The judgments were reversed and the cases remanded for new and separate full trials not limited to punishment.

law entitles the petitioner, is the trial the Court of Appeals found he did not have, and is the trial the Court of Appeals by its order paradoxically says he may not have.

The order of the Court of Appeals remanding the case for a new trial only on the issue of punishment without striking the verdict of guilt denies due process of law to the petitioner and should be corrected by this Court.

Conclusion

For the reasons stated it is respectfully submitted that the judgment of the Court of Appeals of Maryland should be reversed with instructions to amend the mandate of that Court to order a new trial for the petitioner without restriction upon the issues.

E. Clinton Bamberger, Jr.
John Martin Jones, Jr.
Counsel for Petitioner

December 17, 1962

APPENDIX TO THE BRIEF FOR THE PETITIONER

Constitutional Provisions, Statutes and Rules of Practice and Procedure Involved

Constitution of the United States

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Section 1 of the Fourteenth Amendment.

Constitution of Maryland

"In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction." Article XV, Section 5, Constitution of Maryland, Volume 9, Annotated Code of Maryland (1957 ed.), p. 199.

Statutes of Maryland

"All murder which shall be committed in the perpetration of, or attempt to perpetrate, any rape, sodomy, mayhem, robbery, burglary, or in the escape or attempt to escape from the Maryland Pentitentiary [sic], the house of correction, the Baltimore City jail, or from any jail or penal institution in any of the counties of this State, shall be murder in the first degree." Article 27, Section 410, Volume 3, Annotated Code of Maryland (1957 ed.), p. 172.

"Every person convicted of murder in the first degree, his or her aiders, abettors and counsellors, shall suffer death, or undergo a confinement in the petitentiary of the State for the period of their natural life, in the discretion of the court before whom such person may be tried; provided, however, that the jury in a murder case who render

a verdict of murder in the first degree, may add thereto the words 'without capital punishment,' in which case the sentence of the court shall be imprisonment for life, and in no case where a jury shall have rendered a verdict in manner and form as hereinbefore prescribed, 'without capital punishment,' shall the court in imposing the sentence, sentence the convicted party to pay the death penalty." Article 27, Section 413, Volume 3, Annotated Code of Maryland (1957 ed.), p. 173.

"The petition shall be heard in the circuit court or Criminal Court of Baltimore in the county or city where the conviction took place and before any judge thereof except the judge who sat at the trial at which the person was convicted, unless the person convicted consents to hearing by such judge. The court may receive proof by affidavits, depositions, oral testimony, or other evidence, and may order the petitioner brought before it for the hearing. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper. The order making final disposition of the petition shall clearly state the grounds on which the case was determined and whether a federal or a State right was presented and decided. This order constitutes a final judgment for purposes of review." Article 27, Section 645 G, Volume 3, Annotated Code of Maryland (1961 Cumulative Supplement). This statute was enacted by Chapter 44 of the Laws of Maryland of 1958, was amended by Chapter 429 of the Laws of Maryland of 1959 and was repealed by Section 1 of Chapter 36 of the Laws of Maryland of 1962. The pertinent provisions of the statute are now incorporated in Maryland Rules BK 44 and BK 45 effective January 1, 1962 which are not included in the 1962 Supplement of Volume 9 of the Annotated Code of Maryland but are in Maryland Rules of Procedure, 1961 Edition, pp. 496 and 497.

Rules of Practice and Procedure of the Court of Appeals of Maryland

"The court may and at the request of any party shall, give such advisory instructions to the jury as may correctly state the applicable law; the court may give its instructions either orally or in writing. The court need not grant any requested instruction if the matter is fairly covered by the instructions actually given. The court shall in every case in which instructions are given to the jury, instruct the jury that they are the judges of the law and that the court's instructions are advisory only." Maryland Rule 756b, Maryland Rules of Procedure, 1961 Edition, p. 283. [Formerly, with modifications of style, Rule 739b, Volume 9, Annotated Code of Maryland (1957 ed.), p. 422].

"The court may give its instructions at any time after the close of the evidence. The giving of such instructions prior to the argument of counsel shall not preclude counsel from arguing to the contrary." Maryland Rule 756e, Maryland Rules of Procedure, 1961 Edition, p. 284. [Formerly, with modifications of style, Rule 739e, Volume 9, Annotated Code of Maryland (1957 ed.), p. 423].

Office-Supreme Court, U.S.
FILED
FEB 2 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 490

JOHN L. BRADY,

Petitioner,

v.

WARDEN, MARYLAND PENITENTIARY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND AND TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY OF THE STATE OF MARYLAND

BRIEF OF RESPONDENT

THOMAS B. FINAN,
Attorney General of Maryland,

ROBERT C. MURPHY,
Deputy Attorney General of Maryland,

THOMAS W. JAMISON, III,
Special Assistant Attorney General of Maryland,

Suite 1201 — 10 Light Street
Baltimore 2, Maryland,

Attorneys for Respondent.

The Daily Record Co., Baltimore 3, Md.

INDEX

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF PRACTICE AND PROCEDURE INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT:	
I. The judgment of the Court of Appeals of Maryland remanding the case for a new trial on the question of punishment only did not deprive Petitioner of the equal protection of the laws	2
II. Under the facts of this case, the denial of due process of law does not require that Petitioner's conviction be reversed	7
CONCLUSION	11

TABLE OF CITATIONS

Cases

United States ex rel. *Almeida* v. Baldi, 195 F. 2d 815; cert. den. 345 U.S. 904; reh. den. 345 U.S. 946	9, 10
Blackburn v. Alabama, 361 U.S. 199	8
Brady v. State, 226 Md. 422, 174 A. 2d 167	1
Culombe v. Connecticut, 367 U.S. 568	8
Day v. State, 196 Md. 384, 76 A. 2d 729	6
Franklin v. State, 12 Md. 236	5
Giles v. State, 229 Md. 370, 183 A. 2d 359	5
Morey v. Doud, 354 U.S. 457	6
Napue v. Illinois, 360 U.S. 264	8

	PAGE
Payne v. Arkansas, 356 U.S. 560	8
Rogers v. Richmond, 365 U.S. 534	8
Slansky v. State, 192 Md. 94, 63 A. 2d 599	3
Townsend v. Burke, 334 U.S. 736	8
Vogel v. State, 163 Md. 267, 162 A. 705	5
Wheeler v. State, 42 Md. 563	5

Statutes

Annotated Code of Maryland:	
1957 Ed.—	
Article 27:	
Section 410	4
Section 413	4
1961 Supp.—	
Article 27:	
Section 645G (Repealed)	7
Constitution of Maryland:	
Article XV—	
Section 5	3, 5
Constitution of the United States:	
Fourteenth Amendment	5
28 U.S.C., Sec. 1257(3)	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 490

JOHN L. BRADY,

Petitioner,

v.

WARDEN, MARYLAND PENITENTIARY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND AND TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY OF THE STATE OF MARYLAND

BRIEF OF RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals of Maryland is reported in 226 Md. 422 and in 174 A. 2d 167, and is included in the Transcript of Record (R. 46-52).

JURISDICTION

The opinion of the Court of Appeals of Maryland was filed on October 11, 1961 and the mandate of that Court was filed on November 10, 1961 (R. 53-54). The time within which to petition for certiorari was extended until April 9, 1962 by order of Mr. Justice Stewart dated February 9, 1962 (R. 55). The petition was filed April 7, 1962 and was granted October 8, 1962. The jurisdiction of this Court is under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Did the restriction of Petitioner's new trial to the question of punishment only deny Petitioner's constitutional rights?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF PRACTICE AND PROCEDURE INVOLVED

The State of Maryland agrees that the constitutional provisions, statutes and rules of practice and procedure involved in this case are as set forth in Petitioner's brief.

STATEMENT OF THE CASE

The State of Maryland adopts Petitioner's Statement of the Case, with the following modifications:

1. Petitioner's averment that the Court of Appeals held that suppression of evidence by the State denied due process of law to him is inaccurate; that Court held merely that the evidence had been withheld, not suppressed, by the State (R. 51).

2. Petitioner's admission in court of his participation in the robbery of William Brooks during the course of which a homicide was committed constituted a judicial confession of first degree murder.

ARGUMENT

I.

The Judgment of the Court of Appeals of Maryland Remanding the Case for A New Trial on the Question of Punishment Only Did Not Deprive Petitioner of the Equal Protection of the Laws.

Petitioner contends that the judgment of the Court of Appeals of Maryland deprives him of equal protection of

the laws because, unlike all other defendants, he is denied a trial of guilt with the withheld evidence available to him before a jury with the right to find him guilty of a crime less than first degree murder, or even acquit him. The thrust of this argument is two-fold: first, that despite the evidence and the law, a jury would have the right to acquit him or find him guilty of a lesser offense; and second, that in restricting the scope of his new trial to the question of punishment only, the judgment unconstitutionally discriminates against him.

It is true that the Constitution of the State of Maryland makes the jury in a criminal case judges of the law as well as of fact. Article XV, Section 5, Constitution of Maryland (Petitioner's Appendix, p. 15). If the jury's view of the law leads them to an acquittal, their verdict cannot be reviewed or set aside. *Slansky v. State*, 192 Md. 94, 63 A. 2d 599. In a sense the jury, it may be said, has the right to do wrong. But this does not mean that the jury has the right to do wrong deliberately, to act in bad faith or to ignore the law and render a verdict purely on the basis of whim. And the evidence in this case is so conclusive that no jury acting in good faith could fail to find Petitioner guilty of first degree murder.

In three extra-judicial statements given to the police on July 1, 1958, July 3, 1958, and July 9, 1958, Petitioner admitted his participation in the planned robbery of his acquaintance, William Brooks, during the course of which Brooks was choked to death (R. 4, 5 and 6). When Petitioner took the witness stand at his trial, he again admitted his participation in the robbery (R. 47; Petitioner's brief, p. 4). He has never retracted or repudiated this testimony at his trial, which amounted to a judicial confession of first degree murder under the Maryland criminal

statute, Article 27, Section 410, Annotated Code of Maryland (1957 Edition) — (Petitioner's Appendix, p. 15).

At the hearing on his petition for relief under the Maryland Post Conviction Procedure Act in the Circuit Court for Anne Arundel County it was conceded that Petitioner was guilty of murder in the first degree (R. 3). On his appeal to the Court of Appeals of Maryland from the denial of relief, Petitioner again conceded that at his trial he had admitted participation in the robbery in the course of which the homicide occurred (R. 47). This concession is also made in his brief in this Court.

The statement of Charles Boblit dated July 9, 1958, the withholding of which by the prosecutor the Court of Appeals held had deprived Petitioner of a constitutional right, in no way exculpated Petitioner from guilt of first degree murder. This statement makes it clear that it was Petitioner's idea to rob Brooks (Boblit did not even know the man) and that it was Petitioner's idea to strangle him (R. 41). From Petitioner's viewpoint the only favorable statement contained in this confession is the admission that Boblit actually performed the fatal act of strangulation (R. 40). But the question of which one of the two participants in the robbery killed the victim is relevant only to the question of punishment; that is, should the jury bring in a verdict of guilt of first degree murder without capital punishment? See Article 27, Section 413, Annotated Code of Maryland (1957 Edition) — (Petitioner's Appendix, pp. 15-16). It has no relationship whatsoever to the general question of guilt, and no jury acting in good faith could render any verdict except guilty even after considering this statement.

It is well settled in Maryland that there are limitations upon the constitutional provision that the jury shall be

the judges of the law as well as of fact in criminal cases. As early as 1858 it was held that the jury had no right to pass upon the constitutionality of a statute and that it was proper for the trial court to prohibit counsel from arguing that question before the jury. *Franklin v. State*, 12 Md. 236. Trial courts have always passed and still pass upon the admissibility of evidence the jury may consider on the issue of the guilt or innocence of the accused. *Vogel v. State*, 163 Md. 267, 162 A. 705; *Wheeler v. State*, 42 Md. 563. And see *Giles v. State*, 229 Md. 370, 183 A. 2d 359.

A further limitation is implicit in the opinion of the Court of Appeals below and in the very nature of an orderly judicial system: the jury has no right deliberately to flout the law. In spite of the jury's undoubted *power* to do so, it has no *right* to ignore the statutes and rules of court in reaching its verdict. Any contrary result would lead ultimately to chaos. Hence, it cannot be said that a jury would have the right to disregard Petitioner's confessions and ignore the felony murder statute and to find Petitioner not guilty of first degree murder.[1]

Assuming, *arguendo*, that Petitioner is correct in his interpretation of Article XV, Section 5, of the Constitution of Maryland, it does not follow that he was necessarily denied equal protection of the laws. Petitioner argues that the action of the Court of Appeals in limiting his new trial to the question of punishment only is a discriminatory restriction upon the right of an accused to a fair trial according to the procedure prevailing in ordinary cases. But the Fourteenth Amendment to the United States

[1] It follows that the trial judge's advisory instructions, which permitted the jury at Petitioner's trial to find five possible verdicts (R. 44-45), were erroneous. They were the standard instructions used in first degree murder cases in Maryland, but they simply were not appropriate for this case.

Constitution does not forbid all discriminations in the treatment of criminal offenders; the prohibition of the equal protection clause goes no further than invidious discrimination. *Morey v. Doud*, 354 U.S. 457. Whether Petitioner is the victim of invidious discrimination can be determined only by reference to the peculiar facts of this case.

The multiple confessions by Petitioner and the very limited scope of the statement withheld by the prosecutor have previously been discussed herein. There is a third aspect of this case which demands attention. As far as the Court of Appeals of Maryland is concerned, this case is unique. Never before has that court been presented with an appeal from a denial of relief under the Maryland Post Conviction Procedure Act where (1) a conviction of first degree murder, based on a homicide committed in the perpetration of a felony, had previously been affirmed, and (2) the alleged constitutional infirmity in the trial related solely to the question of punishment. Consequently, this is not an "ordinary case", and the fact that Petitioner was not granted the same relief given in "ordinary cases" does not require the conclusion that he was the victim of invidious discrimination. In the light of the totality of the facts in this case, there was a reasonable basis for the Court of Appeals to create a new and valid classification embracing all persons whose cases reach that Court in the same posture as that of Petitioner.

Day v. State, 196 Md. 384, 76 A. 2d 729, relied upon by Petitioner, does not support his contention that he has been unreasonably discriminated against. In that case, two defendants convicted of felony murder each admitted participation in a robbery but accused the other of the homicide. On appeal from the trial court's denial of a severance,

the Court of Appeals reversed the judgments and remanded the cases for new and separate full trials. That case, it should be noted, came up on direct appeal from the convictions.

The instant case, on the other hand, reached the Court of Appeals following the denial of Post Conviction relief after the conviction itself had been affirmed. The Maryland Post Conviction Procedure Act bestowed broad power and discretion upon the courts as to the type of relief which could be granted. If the court should find in favor of a petitioner, the Act provided that the court should enter "an appropriate order with respect to the judgment or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper". Article 27, Section 645G, Annotated Code of Maryland (1961 Supp. — now repealed) — (Petitioner's Appendix, p. 16). In this case, therefore, the court was not required merely to affirm or reverse the conviction of Petitioner, but was able to grant relief which, it is submitted, was singularly "appropriate" *for one whose sole claim of prejudice went to the punishment imposed.*

II.

Under the Facts of this Case, the Denial of Due Process of Law Does Not Require that Petitioner's Conviction Be Reversed.

Petitioner argues that the withholding of Boblit's statement, which constituted a denial of due process of law, vitiated the entire proceeding, and hence the verdict of guilt cannot stand. The validity of this contention must be examined in the light of the facts of this case, particularly the fact that the sole thrust of his defense was

that not he but his companion was the actual murderer (Petitioner's brief, p. 12; R. 27). That defense was not calculated to bring about an acquittal, but merely to influence the jury to add the words "without capital punishment" to a verdict of guilt of first degree murder. The withheld statement was pertinent to this defense, but also was convincing proof of guilt of first degree murder. Petitioner made, in effect, a judicial confession of first degree murder. It cannot be assumed that the jury would act in derogation of its duty and fail to render such a verdict.

How, then, was Petitioner harmed by the denial of due process of law? Only by being deprived of an opportunity to present to the jury additional evidence which might persuade them to spare him the death penalty. To the extent that his trial was unfair the unfairness was related solely to the question of punishment, and that unfairness has been rectified by the judgment of the Court of Appeals. Consequently, since the denial of due process of law did not taint the entire proceeding, it does not require the reversal of the conviction.

Blackburn v. Alabama, 361 U.S. 199; *Napue v. Illinois*, 360 U.S. 264; *Rogers v. Richmond*, 365 U.S. 534; *Payne v. Arkansas*, 356 U.S. 560; and *Culombe v. Connecticut*, 367 U.S. 568, cited by Petitioner, involved the use of involuntary confessions or the knowing use by the prosecutor of perjured testimony. The tainted evidence in those cases had a direct bearing on the verdict and was not *solely* relevant, as in the instant case, to the question of punishment.

In *Townsend v. Burke*, 334 U.S. 736, the absence of counsel prejudiced the defendant when he was sentenced on the basis of assumptions concerning his criminal record

which were materially untrue. Although he had pleaded guilty to burglary and robbery, his convictions were reversed. But the question presented in the present case does not appear to have been raised in *Townsend*. It is respectfully submitted that the relief granted in that case exceeded what is required by the minimal standards of due process.

Petitioner also relies upon *United States ex. rel. Almeida v. Baldi*, 195 F. 2d 815, cert. denied 345 U.S. 904, reh. denied 345 U.S. 946. In that case the United States Court of Appeals for the Third Circuit found that the defendant had been denied due process of law by the state's suppression of evidence relevant only to the degree of punishment for murder in the first degree. The suppressed evidence might have persuaded the jury that the fatal bullet was not fired by the defendant, but by an accomplice in the robbery or by a law enforcement officer. The Court of Appeals affirmed the judgment of the District Court, which had issued a writ of habeas corpus. In order to properly appreciate the decision of the Court of Appeals, it is necessary to review the posture of the case when it reached that court. The suppressed evidence came to light at the trial of another defendant subsequent to Almeida's conviction. Some of this evidence was brought to the attention of the Court of Oyer and Terminer in proceedings for a new trial filed by Almeida. The new trial was denied. Almeida then appealed and also filed a petition for a new trial in the Supreme Court of Pennsylvania, which denied the petition and affirmed the judgment of conviction. After application for certiorari was made to this court and was denied, Almeida filed a petition for a writ of habeas corpus to the Supreme Court of Pennsylvania setting up in detail the evidence secured at the second defendant's trial. Al-

though the issue of intentional suppression of pertinent and vital evidence was explicitly raised by this petition, habeas corpus was denied by the Supreme Court of Pennsylvania in a per curiam opinion giving no reasons for the denial. Again, application for certiorari was denied.

It is clear therefore that although the issue of suppression of evidence was squarely presented to the Pennsylvania courts, those courts had refused to grant any relief. Such is not the case with the Petitioner. The Court of Appeals of Maryland has afforded him a retrial on the issue of punishment for first degree murder, which is the only issue to which the withheld statement was relevant. The District Court in the *Almeida* case had no authority to order a new trial in the state courts on the issue of punishment only, and the action of the Circuit Court of Appeals in affirming the decision of the District Court was entirely proper. It is submitted, however, that the procedural aspects of the *Almeida* case render it *inapposite* here.

CONCLUSION

Petitioner is no longer under sentence of death. The Court of Appeals of Maryland has awarded him a new trial on the question of punishment only, which is the only area of his trial which was tainted by unfairness. In view of his judicial confession, the nature of the withheld statement, the limited scope of his defense and the procedural posture of the case in the court below, Petitioner was not denied his constitutional rights. The judgment of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted,

THOMAS B. FINAN,
Attorney General of Maryland,

ROBERT C. MURPHY,
Deputy Attorney General of Maryland,

THOMAS W. JAMISON, III,
Special Assistant Attorney General of Maryland,

Attorneys for Respondent.